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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1650

OTTO KERNER, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. ———

OTTO KERNER, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Otto Kerner, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming in part the conviction entered against him in the United States District Court for the Northern District of Illinois, Eastern Division. Kerner's conviction was affirmed on 9 counts charging conspiracy, mail fraud, false grand jury testimony, false statements, tax evasion and filing a false tax return. Conviction on three interstate bribery counts was reversed.

OPINION BELOW

The opinion of the Court of Appeals and its opinion denying rehearing are presently unreported but are reprinted in the Appendix (1a, 65a). The three opinions of the District Court are set forth in the Appendix (73a). Its opinion of May 30, 1972, is reported at 347 F. Supp. 743.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1974. A timely petition for rehearing was denied on March 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Constitution prohibit the indictment and trial of a federal judge prior to his removal from office by the impeachment process?

2. May the mail fraud statute, 18 U.S.C. § 1341, be used as a federal prosecutorial weapon to charge a state governor with defrauding the state and its citizens out of his loyal and faithful services?

3. May a person be convicted of the federal crime of conspiracy under 18 U.S.C. § 371 to violate the interstate travel act, 18 U.S.C. § 1952, where there was no agreement to engage in interstate activity, and where the substantive travel act counts were dismissed because there was no sufficient interstate activity?

4. Was conviction of mail fraud proper in light of *United States* v. *Maze*, 42 U.S. L. Week 4113 (1974), when the mailings forming the predicate of the mail fraud charges came after the completion of the alleged scheme and were not necessary to or in furtherance of the alleged scheme?

5. Is it inherently prejudicial for a defendant to stand trial for perjury before the grand jury together with charges of other substantive crimes? Was such joinder prejudicial in the circumstances of this case where the prosecutor asked the jury to convict on all counts if they found the defendant guilty of perjury?

6. Is a defendant entitled to a severance and a separate trial from a co-defendant who refuses to testify but who possesses essential exculpatory evidence? In a joint trial, may a co-defendant's out-of-court hearsay declarations be admitted where the defendant cannot confront and cross-examine the declarant co-defendant?

7. Does the federal false statement statute, 18 U.S.C. § 1001, apply to unsworn voluntary oral answers to federal investigative agents?

8. Was the specially appointed panel correct in deciding that it was not bound by the law of the Circuit to which it was assigned?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Set forth in the Appendix are United States Const. Art. I (3) (7); Art. II (4); Art. III (1); Amendment V; Amendment VI; 18 U.S.C. §§ 371, 1001, 1341, 1623 and 1952; and Rule 14 of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Kerner and four other persons were indicted in 1971 in the Northern District of Illinois.[1] The 19-count indict-

[1] The other four were Theodore Isaacs, who was State Revenue Director in the Kerner administration; Joseph Knight, who had been Illinois Director of Financial Institutions; William S. Miller, Chairman of the Illinois Racing Board during Kerner's terms; and Faith McInturf, Miller's personal secretary.

ment charged offenses covering the years 1961-1971 when Kerner was Governor of Illinois and United States Circuit Judge for the Seventh Circuit. Kerner was named in 17 counts charging (1) conspiracy to commit interstate bribery and mail fraud; (2) interstate bribery under 18 U.S.C. § 1952; (3) mail fraud under 18 U.S.C. § 1341; (4) perjury before the grand jury under 18 U.S.C. § 1623; (5) false answers to IRS investigators under 18 U.S.C. § 1001; and (6) tax evasion and filing false tax returns under 26 U.S.C. §§ 7201, 7206. Kerner and Theodore Isaacs, his State Revenue Director, were convicted on all counts. The other defendants were severed before trial. The District Court granted judgment of acquittal on five counts and imposed three-year concurrent sentences on the remaining 12 counts together with five $10,000.00 consecutive fines on five counts. The Court of Appeals, *per curiam*, reversed conviction on the three counts of interstate bribery under 18 U.S.C. § 1952 and affirmed on 9 counts, with Judge Johnsen dissenting in part. Thus, Kerner now stands convicted of conspiracy (Count I); mail fraud (Counts VI, VIII, IX and XIII); grand jury perjury (Count XIV); false statements (Count XV); tax evasion (Count XVI); and filing false tax returns (Count XVII).

The case revolves around Kerner's purchase of shares in two Chicago horseracing enterprises, Chicago Thoroughbred Enterprises (CTE) and Chicago Harness Racing Inc. (CHR). In 1962, Mrs. Marjorie Everett, the president of CTE, promised to sell 25 shares of CTE common stock to Governor Kerner and 5 shares to Isaacs for $1,000.00 per share. The transaction was arranged by William Miller, Chairman of the Illinois Racing Board and Mrs. Everett's friend and mentor. Miller testified at trial, under a grant of immunity, that the offer was made to Kerner so that the Governor would "look favorably" on Mrs. Everett and her enterprises, although that

purpose was never conveyed to Kerner. No favors were asked by Mrs. Everett of Governor Kerner; the two never discussed the transaction. Kerner accepted the offer in 1962 but the stock purchase was actually effectuated in 1966 at the originally-agreed price of $1,000.00 per share at a time when the stock had risen in value to $6,000.00 per share. The government claimed that Kerner's purchase in 1966 at less than market value was a bribe and that the proceeds should have been reported as ordinary income in 1966 rather than as a capital gain which was reported when the stock was sold in 1967. Contemporaneous with the 1966 CTE purchase, Kerner bought stock in CHR from Joseph Knight, an old friend and associate of Miller, at 40 cents per share at a time when the stock was worth $2.00 per share. This was also allegedly a bribe, giving rise to ordinary income and not a capital gain as reported. These transactions gave rise to the conspiracy, interstate bribery and tax evasion counts. The mail fraud counts charged that Kerner's acceptance of the stock offer defrauded the state and its citizens of his honest and impartial services as Governor.

The second phase of the case revolves around the charges that Kerner lied and concealed material facts so as to cover up his purchase and ownership of racing stock and his activities as Governor with respect to the regulated racing industry. This phase gives rise to the charges of perjury before the grand jury, false statements to IRS investigators and the filing of a false tax return.

Kerner's defense was that his stock purchase was the lawful exercise of an investment opportunity made available out of considerations of friendship by persons who were friends and supporters, not done in consideration of corrupt favors and permissible under Illinois law.

Further facts are set forth below as they pertain to the issues presented as to particular counts of the indictment.

The heart of this case is a charge of bribery against a state official in violation of state law, and the multitude of federal offenses were all alleged to arise from the basic stock purchase. In addition to the threshold jurisdictional question of Kerner's amenability to prosecution before removal, there is thus presented in stark simplicity the question of the extent to which federal criminal laws should be stretched to reach state or local official conduct. Kerner's conviction of conspiracy and mail fraud represents nothing less than the exercise of federal visitorial power over local public officials' conduct in office and it signals a marked departure from traditional limitations on the application of federal criminal laws to local conduct.

REASONS FOR GRANTING THE WRIT

I

THE CONSTITUTION PROHIBITS THE INDICTMENT AND TRIAL OF A FEDERAL JUDGE PRIOR TO HIS REMOVAL FROM OFFICE BY THE IMPEACHMENT PROCESS

The amenability of an Article III judge to criminal prosecution is a substantial constitutional question of first impression clearly calling for a grant of certiorari. A federal judge serves for life during "good behavior", U.S. Const. Art. III, and is removable from office only by the carefully circumscribed and difficult Congressional impeachment process, U.S. Const. Art. II (4); Art. I (3) (7). The soundest Constitutional authorities agree that "the intention was to make impeachment the sole means of removal from judi-

cial office." [2] The prohibition against removal of judges by any means other than impeachment has been affirmed by statements of the Founding Fathers [3], by Constitutional scholars,[4] and by language in judicial decisions,[5] but this Court has never decided this obviously important question.

Since impeachment is the sole means of removal, there is a "lack of power to establish a mode of trial other than by impeachment for the removal of federal judges",[6] and

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[2] Kurland, *The Constitution and the Tenure of Federal Judges; Some Notes from History*, 36 U. CHI. L. REV. 665 (1969). One member of the Court of Appeals in this case, Judge Lumbard, had expressed his views prior to this case that removal by judicial action is constitutional. Since Judge Lumbard is a noted proponent of this school, Supreme Court review would afford petitioner a fairer opportunity to advocate the contrary. See Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169 (1961); Statement of Hon. J. Edward Lumbard, Hearings on the Independence of Federal Judges, 91st Cong. 2d Sess. p. 56.

[3] Hamilton: *The Federalist*, No. 79, see also No. 65; Madison Debates on the first Judiciary Act, 11 *Annals of Congress* 736 (1801); Gerry, 11 *Annals of Congress* 738 (1801); Morris, 11 *Annals of Congress* 90 (1801); See I *Elliot's Debates*, 144-298; V *Elliot's Debates*, 481-82, 526.

[4] Kurland, supra, note 2; Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, The Supreme Court Review 136 (1969); Otis, *A Proposed Tribunal: Is it Constitutional?* 7 U. KAN. CITY L. REV. 7 (1938); Keeffe, *Explorations in The Wonderland of Impeachment*, 59 A.B.A.J. 885 (1973); Broderick, *Citizens Guide to Impeachment of a President: Problem Areas*, 23 CATHOLIC U. L. REV. 205, 218 (1973); Hon. Sam Ervin, *Hearings on The Independence of Federal Judges*, 91st Cong. 2d Sess. May 8, 1970, pp. 330-44 (1970); Hon. Emmanuel Celler, H. Rep. 814, pt. 2, 75th Cong. 1st Sess. (1937); Note 51 HARV. L. REV. 330, 336 (1937).

[5] Chandler v. Judicial Council, 398 U.S. 74, 136 (Douglas, J., dissenting), 141 (Black, J., dissenting); see Glidden Co. v. Zdanok, 370 U.S. 530 (1962); American Ins. Co. v. Canter, 26 U.S. 1 (Pet.) (1828).

[6] Kurland, *supra*, at p. 697.

a trial which effectively deprives a federal judge of his judicial power is an unconstitutional form of removal. Prosecution of a federal judge operates to remove him from the bench in all ways but in name only, is an unwarranted incursion by the executive on judicial independence, and violates the intention of the Framers to immunize the judiciary from interference by other branches. The practical results of both impeachment and indictment are precisely the same on the judicial function. Where the effect of a proceeding is to "disqualify a judge from sitting, removing him *pro tanto* from office, it moves against the individual with all the sting and much of the stigma that impeachment carries." Douglas, J. in *Chandler*, *supra*, 398 U.S. at 136. Judicial independence requires freedom for judges not merely to hold office but to perform the judicial functions. The Constitutional structure safeguards the substance of the judicial office, not its form only.

The Constitution sets out a clear sequence whereby a person removed by Congress is still thereafter liable to criminal prosecution. Art. I (3)(7) states that "the *party convicted* shall *nevertheless* be liable and subject to indictment, trial, judgment, and punishment, according to law" (emphasis added). This sequence of sanctions first allows for removal by Congress and then, but only then, for criminal culpability.[7] Thus, one Constitutional scholar has concluded that ". . . no person subject to impeachment can be . . . prosecuted in any way so long as he remains in office." Keeffe, *supra*, note 4.

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[7] "The punishment which may be the *consequences* of conviction upon impeachment, is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will *still* be liable to prosecution and punishment in the ordinary course of the law . . ." The Federalist, No. 65 (emphasis added).

A federal judge is fully subject to the criminal laws after removal, but his constitutional office brings into play fundamentally different considerations, in respect of the office and its independence, for "offenses and offenders impeachable come not, in these descriptions, within the sphere of ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different object." 1 Wilson, 1791 Lecture.

This is a virgin issue in this Court, and substantial textual and scholarly support exists for the pre-removal immunity of a federal judge. Kerner ought not commence service of a prison sentence and remain deprived of his judicial functions if the District Court had no constitutional power to try him, and thus the need for review of this substantial constitutional question is compelling.

II

A SCHEME TO DEPRIVE A STATE AND ITS CITIZENS OF THE LOYAL AND FAITHFUL SERVICES OF A STATE OFFICIAL IS NOT MAIL FRAUD

The mail fraud counts charged that Kerner schemed to defraud the State of Illinois and its citizens out of his "conscientious, loyal, faithful, disinterested and unbiased services" as Governor by virtue of his acceptance of a bribe in the form of stock. There was no charge or proof that the scheme contemplated defrauding the State or its citizens—or anyone else—out of anything of value in the form of money or property.

The question is whether a state official commits mail fraud if he deprives the state and citizens of his loyal and faithful services, a question never decided by this Court and one of obviously great significance in striking a proper balance in the "sensitive relation between fed-

eral and state criminal jurisdiction." *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

The use of the mail fraud statute by federal prosecutors to challenge the "loyalty and faithfulness" of local officials permits an unbridled federal visitorial review over the conduct in office of state officials whenever they engage in conduct, the substance of which is the violation of state law, or whenever they have a conflict of interest or fail to make proper disclosures. Every local dereliction of duty would be mail fraud as long as the mails happened to be used to further that activity.

The essence of Kerner's alleged unlawful conduct was the commission of bribery in arguable violation of Illinois law. Federal jury review of whether that conduct denied the citizens of his "loyal and faithful services" is an outrageously unwarranted application of the mail fraud statute and an intrusion beyond the bounds of proper federal-state relations under a standard so vague as to jeopardize any state official who breaches his trust or violates his fiduciary duty.

The putative foundation for the charges in this case was a triology of cases in the Fifth Circuit against state officials, but in each of these cases the fradulent scheme was a concrete and specific scheme to take public monies out of the public treasury. *Shushan* v. *United States*, 117 F.2d 110 (5th Cir. 1941); *Bradford* v. *United States*, 129 F.2d 274 (5th Cir. 1942) *cert. denied*, 317 U.S. 683 (1942); *United States* v. *Faser*, 303 F. Supp. 380 (E.D. La. 1969).

But no case has ever applied the mail fraud statute under the vague theory that deprival of "loyal services" is criminal. Yet in this case, the only conduct proved against Kerner was just that—the purchase of stock from private interests creating an alleged conflict of interest amounting to disloyalty to the citizens of Illinois. At the

most, Kerner's conduct was simply a breach of trust or conflict of interest amounting to a constructive fraud.

But, breach of trust or a violation of fiduciary duty is not mail fraud. *Epstein* v. *United States*, 174 F.2d 754 (6th Cir. 1949); *United States* v. *George*, 477 F.2d 508 (7th Cir. 1973); *Post* v. *United States*, 407 F.2d 319, 329 (D.C. Cir. 1968) *cert. denied*, 393 U.S. 1092. The mail fraud statute must be confined to the proper areas and defined conduct intended by Congress, as this Court recently recognized in *United States* v. *Maze*, 42 U.S. L. Week 4113. The courts have consistently held that the statute should be strictly construed and confined so as to avoid encroachment into areas of state-prohibited civil wrongs in the nature of breach of trust. *United States* v. *Edwards*, 458 F.2d 875 (5th Cir. 1972); *United States* v. *Kelem*, 416 F.2d 346 (9th Cir. 1969) *cert. denied*, 397 U.S. 952 (1969).

It is critically important for this Court to define the proper scope of the application of the mail fraud statute against local officials. The Court should define in clear terms the reach of the statute so as to exclude from its scope the kind of breach of trust, conflict of interest and deprival of "loyal and faithful services" which would turn every local official malefaction or misfeasance into mail fraud. Mail fraud requires an intent to deprive a victim of "something of value". *United States* v. *Reese*, 96 F. Supp. 913 (E.D. Pa. 1951). Honest and faithful public service, however valuable, is not the "value" which the mail fraud statute was intended to cover. Those terms described a broad area of local fiduciary obligations too vague to be the predicate of mail fraud or to permit federal juries to evaluate the loyalty of local officials and send them to jail for disloyalty or unfaithfulness.

Such stretched federal criminal jurisdiction severely threatens the independence of state governments, and par-

ticularly threatens their political leaders whose party may be out of favor nationally. If the federal government is to get into the business of setting standards of loyalty and faithfulness for state officials, it ought only do so directly, by cautious and prudent legislation, rather than by criminal prosecution. Otherwise, all concepts of federalism are meaningless. *Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971).

III

CONSPIRACY TO VIOLATE A FEDERAL LAW REQUIRING USE OF INTERSTATE FACILITIES REQUIRES PROOF OF AN AGREEMENT TO USE THOSE INTERSTATE FACILITIES

Kerner was convicted under 18 U.S.C. § 371 of conspiring to violate the Travel Act, 18 U.S.C. § 1952, *i.e.*, to travel in interstate commerce or use facilities in interstate commerce with intent to distribute the proceeds of bribery in violation of the Illinois bribery law. The core of the entire case was the conspiracy count charging an agreement to violate Illinois bribery law. The substantive object of the conspiracy was therefore the violation of a state law, and federal jurisdiction purported to attach only because of the interstate nature of the alleged conspiracy.[8]

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[8] Mail fraud was also an alleged object of the conspiracy; however, the alleged fraud was contingent upon the bribery; *i.e.*, that Kerner defrauded the State and its citizens because he took a bribe, and virtually all of the evidence in the conspiracy case related to bribery. Mail fraud was thus a tag-along allegation. Although the Court of Appeals—anomalously—held that intent to use the mails was a requisite of the conspiracy, this essential element was not charged to the jury. Nor was the jury given a requested instruction that intent to engage in interstate activity was a constituent part of the conspiracy case. Moreover, for the reasons stated in Point II, the mail fraud statute was impermissibly applied.

The Court of Appeals decided that the bribery case did not involve any interstate activity and overturned the three substantive Travel Act convictions. There was absolutely no interstate activity involved in the alleged bribery scheme, and absolutely no intent on the part of any defendant to engage in interstate activity.

Astoundingly, having dismissed the substantive Travel Act convictions, the Court of Appeals affirmed the conviction of conspiracy to violate the Travel Act by holding that the conspiracy need not be supported by proof of an agreement to engage in interstate activity (40a). The remarkable result is the upholding of a conviction of the federal crime of conspiracy based solely upon proof of an agreement to violate a state bribery law. There was simply no proof in this case of an agreement to violate federal law.

The ramifications of this holding are staggering, for they permit federal conspiracy prosecutions against persons who conspire to violate state law. This result is flatly contrary to all rational concepts of the scope of federal conspiracy law and the relationship between federal and state criminal jurisdiction. This issue is thus of a piece with the mail fraud case, and together they exhibit the extent to which the entire case was an overreaching and stretching of federal criminal jurisdiction.

A federal conspiracy conviction requires proof of an agreement to commit an offense against the United States. *Pereira* v. *United States*, 347 U.S. 1 (1954); *Ingram* v. *United States*, 360 U.S. 672 (1959). No court has ever upheld a federal conspiracy conviction in a case where the only objective of the agreement was the violation of state law. This issue is critically significant in cases where the alleged object of the conspiracy is a federal statute with an interstate element, for the gist of the offense remains a violation of state law. In such cases, this Court has refused to "mark a major inroad

into a domain traditionally left to the States". *United States* v. *Bass*, 404 U.S. 336, 339 (1971).

Every essential element of the crime of conspiracy must be proved to support conviction. Interstate activity is an essential element of a violation of § 1952 and thus, an agreement to violate that section must contemplate interstate activity. Without this element, *there is simply no federal jurisdiction.*

The decision below is a maverick aberration which rejects without any sound reasoning the holding of this Court in *Pereira*, and the decisions of other circuits.[9] As *Pereira* stated, "the charge of conspiracy requires proof not essential to the convictions on substantive offenses—proof of an agreement to commit an offense against the United States . . ." 347 U.S. at 11-12.

To support its decision, the Court of Appeals cited only *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970). However, in *Roselli* the defendants were convicted of substantive Travel Act violations because they traveled across state lines. *Roselli* never considered whether a conspiracy conviction could be sustained on its own where there was in fact no interstate activity. Here, there was neither interstate activity nor even an agreement to employ interstate activity.

Where a defendant commits the substantive crime by engaging in interstate travel, his intent to do so is automatically present and needs no further proof. The gist

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[9] United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969); United States v. Ruthstein, 414 F.2d 1079 (7th Cir. 1969); United States v. Barrow, 363 F.2d 62 (3d Cir. 1966); United States v. Barnes, 383 F.2d 287 (6th Cir. 1967); United States v. Marquez, 449 F.2d 89 (2d Cir. 1971); United States v. Alsondo, 486 F.2d 1339 (2d Cir. 1973) *cert. granted, sub nom* U.S. v. Feola, 42 U.S. L. Week 3573.

of the crime is interstate travel with the intent to violate a local law and the crime is complete on proof of travel with that intent. But the gist of a conspiracy is an agreement. If the agreement encompasses only violation of state law, it does not contemplate interstate activity and it cannot be made a federal crime. Anti-federal intent is essential. "[T]here can be no conspiracy to [commit an interstate crime] unless it is understood to be a part of the project that they shall cross state lines." *United States* v. *Crimmins*, 123 F.2d 271, 273-74 (2d Cir. 1941).

The significance of this issue prompted this Court to grant *certiorari* in a similar case, *United States* v. *Feola*, 42 U.S. L. Week 3573 (1974), to review the Second Circuit's decision that anti-federal intent is essential to a federal conspiracy. Because the basic issue here is the same, this case clearly merits consideration along with *Feola*. But Kerner's case is significantly different in one key respect. Here, the substantive convictions could not stand; the completed federal crime was not committed. In *Feola*, the defendants assaulted a person not knowing that he was a federal officer. The substantive conviction was valid, although the conspiracy lacked the anti-federal intent. Here, Kerner's substantive conduct was not a federal crime, yet his mere agreement to engage in purely local conduct has been held to be the federal crime of conspiracy to misuse interstate facilities.

This case is far more serious and significant than *Feola*, because local official conduct is properly the domain and concern of the states. The decision below turns any local bribery conspiracy into a federal crime, and creates the anomaly that an agreement to do an act is a federal crime whereas the performance of the act is not. In the interest of our federal system, this Court

must prohibit such federal overreaching and properly limit the scope of federal conspiracy law.[10]

IV

THE MAILINGS WERE NOT IN FURTHERANCE OF THE ALLEGED SCHEME

Also presented for review is the question of whether the Court of Appeals disregarded this Court's recent decision in *Maze, supra.* In *Maze,* the Court struck down a mail fraud conviction premised upon mailings that were not "for the purpose of executing" the scheme. *Maze* held that jurisdiction under the mail fraud statute arises only when the mailing is a closely related and necessary part of the effectuation of the scheme. If the mailing is not necessary for the purpose of fulfilling the scheme, it is an inadequate premise for mail fraud jurisdiction.

The four mail fraud counts upon which Kerner was convicted were based upon mailings which occurred long after the alleged scheme had been completed and were not for the purpose of executing the scheme. As demonstrated in Judge Johnsen's dissent, none of the mailings was in furtherance of nor in any way necessary to the success of the alleged scheme because the alleged bribe occurred during the summer of 1966, whereas the mailings were later incidental occurrences (64a).

In February, 1967, Kerner mailed to Mrs. Everett an IRS information form reflecting for tax purposes his payment to her in 1966 of interest for the four years between the stock commitment and the stock purchase.

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[10] Reversal of the conspiracy case would clearly compel reversal on all counts. The conspiracy case was the core of the whole trial. Voluminous hearsay evidence was admitted which could not come in otherwise. Had the jury not been allowed to consider the hearsay, conviction on other counts may not have followed.

Copies of this form were sent to the IRS. This mailing did nothing more than reflect an interest payment which had in fact been made and was not conceivably in furtherance of a scheme to defraud the state or its citizens. (Count VI).

On June 1, 1967, Kerner deposited in his bank a $7,000 check representing the proceeds of sale of CHR stock purchased in 1966. At the close of business, the bank mailed all checks deposited that day to its Chicago depository bank. Clearly, under *Maze* and *Kann* v. *United States*, 323 U.S. 88 (1944), the bank's mailing was not "for the purpose of executing" a scheme to defraud the state or its citizens. The mere mailing of a check for collection after the fruits of the scheme are realized is not within the jurisdiction of § 1341. (Count VIII).

In March, 1967, Kerner received a $2,800 check as a dividend declared by CHR to all shareholders. Kerner's deposit of the check by mail is precisely the kind of extraneous and non-essential mailing held insufficient in *Maze*. (Count IV).

Even more clearly, the November, 1967 mailing of an official form from the Illinois Racing Board to a racing association advising of the award of racing dates was merely an official act unconnected with the alleged fraud, even assuming that Kerner somehow "caused" the mailing. See *Pereira* v. *United States*, 347 U.S. 1 (1954). Such a ministerial act, coming long after the alleged bribe, unnecessary to the alleged scheme, and unknown by Kerner, cannot stand the test of *Maze*.

These allegations against Kerner stretch the mail fraud statute far beyond its intended scope. The Court of Appeals majority failed to apply the limitations announced in *Maze* to the jurisdictional facts in this case.

V

INHERENT PREJUDICE EXISTS IN THE JOINDER OF GRAND JURY PERJURY AND SUBSTANTIVE OFFENSES

Kerner was charged with false declarations before the grand jury under 18 U.S.C. § 1623 and was tried for that offense together with the multitude of other crimes charged in the indictment.

In a massive multi-count indictment such as this, a defendant who is found by the jury to be guilty of a false statement before the grand jury is irretrievably prejudiced in his defense of the other joined counts. A defense on the merits is unavailing if the jury has decided not to believe the defendant as a result of the perjury charge. Their disbelief, arising from the government's perjury case and from their knowledge that the grand jurors disbelieved him, spills over and affects irreparably a defendant's ability to meet the other charges on their own merits.

False swearing to a grand jury under 18 U.S.C. § 1623 is a unique charge inasmuch as the 12 petit jurors learn that 23 citizens of the grand jury believed that the defendant lied to them. It is thus unlike any other crime when joined for trial with other charges. If a defendant lies to a grand jury, he is inevitably assumed to be guilty of the other charges. If he takes the stand in his own defense, as did Kerner, and as he must since only a single witness need now swear against him, his credibility is already destroyed by virtue of the government's evidence of perjury, and his testimony in defense of the other charges is effectively destroyed.

This case presents the starkest context in which such prejudice arises, for government counsel in closing argument told the jury that Kerner's alleged perjury was

"the heart of the case" which "colors" every other count. Government counsel told the jury that they were entitled to convict Kerner of conspiracy, bribery, mail fraud and tax evasion if they found him guilty of perjury. The jury found Kerner guilty on all 17 counts even though the trial court later dismissed 5 counts for lack of evidence. The jury's indiscriminate wholesale verdict strongly suggests that the spillover effect of the perjury case was total.

A recent decision has held that joinder of the sort here employed is inherently prejudicial and cannot be cured by limiting instructions to the jury.[11] In *United States* v. *Pacente*, 490 F.2d 661 (7th Cir. 1973), now awaiting *in banc* decision by the Seventh Circuit, joinder was held inherently prejudicial:

> ". . . It is one thing for the petit jury to believe that the grand jury concluded that probable cause existed that the defendant committed the substantive offense. It is quite another thing, however, for the petit jurors to know that the grand jurors—laymen like themselves—believed the defendant to have lied to them. Such knowledge serves to impair a defendant's ability to effectively defend himself on the substantive charge." 490 F.2d at 664.

A jury of 12 persons is not likely to find themselves able to go against the conclusion of a grand jury of 23 which also saw and heard the defendant. It is thus difficult enough for a person to defend against a false declaration charge, but when he must also defend against other serious charges at the same time he is hopelessly prejudiced to the point where the burden of proof effectively shifts to him to prove himself truthful and honest, and a defendant is thus compelled to testify if he ex-

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[11] The ineffectiveness of limiting instruction to cure inherent prejudice was recognized in Bruton v. United States, 391 U.S. 123 (1968).

pects the jury to believe him. *Pacente* found that the realistic burden of proof does effectively shift to the defendant. Although joinder of related charges is a proper device which saves judicial time and manpower, joinder cannot be upheld where a defendant's right to a fair trial is irredeemably prejudiced. *United States* v. *Shuford*, 454 F.2d 772 (4th Cir. 1971).

This question is a critical one in the administration of criminal trials in the district courts. In a lengthy appearance before the grand jury, it is unlikely that any person can fully remember and truthfully relate every detail, so it is not enough to say that he should tell the truth or remain silent. Fair play is offended by bootstrapping false statements into a conviction of other charges, even if the defendant willfully lied to the grand jury. Impeaching a defendant's credibility is a permissible right of prosecutors, but indirect impeachment on substantive counts by evidence in a perjury case negates the right to a fair trial and separate consideration of guilt or innocence on each count.

It is quite possible that Kerner was convicted on 16 counts because the jury disbelieved him as a result of the perjury case. The strong possibility of an unjust verdict compels reversal so that, if a new trial is ordered, Kerner's innocence or guilt of the other charges may be fairly and independently determined.

VI

KERNER WAS DEPRIVED OF EXCULPATORY TESTIMONY AND OF HIS RIGHT OF CONFRONTATION BECAUSE SEVERANCE FROM ISAACS WAS DENIED

The refusal to grant Kerner a severance from Isaacs in the face of Isaacs' failure to testify created two-fold prejudice of constitutional proportions.

The first aspect of the prejudice was the denial to Kerner of Isaacs' critical exculpatory testimony. Had Kerner been tried separately, he would have called Isaacs as a witness and Isaacs, not in jeopardy in Kerner's trial, would in all likelihood testify. In the joint trial, Isaacs elected not to testify and of course Kerner could not compel him to the stand. *DeLuna* v. *United States*, 308 F.2d 140 (5th Cir. 1962). As a result, Kerner was deprived of important exculpatory testimony on nine specific matters. Kerner's counsel proffered to the Court in support of his severence motion nine facts which Isaacs would relate if he testified, the most important being detailed denials of favorable treatment by Kerner of Mrs. Everett's racing companies, including crucial evidence about the 1962 stock offer meeting between Kerner and Miller, which Isaacs attended.

In *United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965) and in *Shuford*, *supra*, a defendant was held entitled to a severance and separate trial upon a showing that a silent co-defendant possessed important exculpatory testimony. It is impossible, of course, to establish with certitude that the co-defendant would testify in a separate trial; the likelihood of his doing so is enough. Even if he does not testify, he may be compelled to the stand in a separate trial and his silence may be commented upon by defense counsel. Here, Isaacs clearly possessed exculpatory evidence and would most probably have testified at Kerner's separate trial.

It is unfair to deprive a defendant of important testimony when the simple granting of a severance can make it available.

The second aspect of the prejudice is a question which has long troubled the courts and which this Court has never resolved. The government introduced out-of-court hearsay declarations of Isaacs through other witnesses, and under the co-conspirator exception to the hearsay

rule, these declarations were binding against Kerner. If Isaacs had testified, his testimony would not only have exculpated Kerner; it also would have refuted or explained the out-of-court statements attributed to him. Yet Kerner did not have the opportunity to confront these statements by calling Isaacs.

Although this Court has never held that the co-conspirator exception violates the Sixth Amendment's confrontation clause, the Court has never upheld the use of hearsay where the declarant is wholly unavailable to be called as a witness. Indeed, this Court's upholding of the hearsay exception has always been in cases where the declarant has been available, thus avoiding a confrontation problem. In *Dutton* v. *Evans*, 400 U.S. 74 (1970), where hearsay testimony was held admissible, the Court noted that the declarant was subject to the defendant's subpoena power and his declarations tested by cross-examination. 400 U.S. at 88. Where the declarant is available this Court has pointed to availability as a curative for the problems created by the confrontation clause, because availability permits confrontation. *California* v. *Green*, 399 U.S. 149 (1970); *Nelson* v. *O'Neill*, 402 U.S. 622, 628 (1971). Unavailability, however, deprives a defendant of his right to confront the government's evidence. *Douglas* v. *Alabama*, 380 U.S. 415 (1965) held that a witness' out-of-court statement was inadmissible because he remained silent and could not be cross-examined.

Here, however, as in *Bruton* v. *United States*, 391 U.S. 123 (1968), the declarant is a co-defendant who cannot be called. In *Bruton*, a severance was ordered because the co-defendant's confession implicating the defendant was admitted. In *Bruton* the confession was admissible only against the co-defendant, whereas a hearsay declaration binds all co-conspirators. Yet this Court recognized that the confession implicated the defendant and "bound" him because no curative instruction could limit its admissibility.

This case thus presents the question which this Court has never specifically reached: May hearsay be admitted where the declarant is unavailable for confrontation? The problem may be simply resolved by requiring a severance whenever the government produces inculpatory hearsay declarations of a silent co-defendant, for in a separate trial he may be called as a witness.

VII

THE FALSE STATEMENT ACT, 18 U.S.C. § 1001, DOES NOT APPLY TO ORAL, UNSWORN ANSWERS TO INVESTIGATIVE AGENTS

Count XV of the indictment charged Kerner under 18 U.S.C. § 1001 with giving false answers to IRS investigators who interviewed him about his 1967 tax return. Oral conversational answers given voluntarily and not under oath in an interview with investigative agents cannot support a criminal false statement charge. A significant line of cases has confronted this question and held that § 1001 does not apply to such a situation, and in 1969 this Court expressly left this question open in *Bryson* v. *United States*, 396 U.S. 64, 71, note 10 (1969).

The reasoning of these decisions differs but their conclusions are identical: false oral answers to government investigators are not within the jurisdiction of § 1001. *Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962); *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955); *United States* v. *Davey*, 155 F. Supp. 175 (S.D. N.Y. 1957). In *Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967), the court found the use of § 1001 to cover false statements to investigative officers an awesome and dangerous power not envisioned by the Congress, especially since the penalty is greater than the penalty for perjury under oath:

> "If the Congress wanted unsworn statements to investigative officials to serve as the basis for severe criminal punishment we think it would have said so in clear, direct and positive terms." 374 F.2d at 367.

Friedman was the case which this Court specifically declined to approve or disapprove in *Bryson*.

The Second Circuit expressly rejected *Friedman* in *United States* v. *Adler*, 380 F.2d 917 (2nd Cir. 1967). This direct conflict between circuits involves an important question of federal criminal jurisdiction requiring resolution by the Supreme Court.

Most other decisions support the *Friedman* holding. In *United States* v. *Levin*, 133 F. Supp. 88 (D. Colo. 1953), Circuit Judge Pickett found it "inconceivable" that Congress intended § 1001 to apply to unsworn answers to investigators, particularly where general and specific perjury statutes are in force. In *United States* v. *Philippe*, 173 F. Supp. 582 (S.D. N.Y. 1959), the defendant's answers to IRS special agents denying his receipt of kickback money was held outside the intended purview of § 1001.

Voluntary unsworn answers to a government agent investigating criminal violations of the tax laws are not "statements" subverting governmental functions within the intended meaning of § 1001. The Congress intended § 1001 to prevent such things as false filings, reports and applications, and not to operate as a perjury statute. The Court of Appeals decision misconstrues § 1001, is at variance with decisions in other circuits, and exposes citizens to severe punishment any time they answer questions posed by government agents. This result was never intended by the Congress.

VIII

THE SPECIAL COURT OF APPEALS PANEL EXCEEDED ITS POWER IN FAILING TO FOLLOW THE LAW OF THE CIRCUIT

All of the active judges of the Seventh Circuit recused themselves in this case. The Chief Judge of the Circuit presented a certificate to the Chief Justice of the United States stating the necessity of the assignment of outside circuit judges. On September 19, 1972, the Chief Justice entered an order designating three retired Senior Circuit Judges from three other circuits as the panel to hear this case. The Chief Justice acted under the authority of 28 U.S.C. § 294(d) permitting such assignment of retired judges.[12]

In its opinion below, the panel consistently reached conclusions as if it were an independent Court of Appeals, and in two instances critical to issues raised herein, the panel flatly rejected the law of the Seventh Circuit. It is our submission that under 28 U.S.C. § 296, assigned judges are empowered to perform their responsibilities only to the same extent as regular judges of the circuit and may not set themselves up as a unique forum unbeholding to the law of the circuit to which they are assigned. In his concurring and dissenting opinions, Judge Johnsen of the Eighth Circuit correctly perceived the panel's responsibility to follow circuit law (64a, 70a).

Upon rehearing the panel, recognizing that *United States* v. *Pacente, supra*, was the law of the Seventh Circuit, stated:

> "This panel is under no obligation to follow any opinions of the Seventh Circuit, whether by a panel or by the Court *en banc*, filed in any cases or mat-

[12] It appears that the Chief Justice could also have acted under 28 U.S.C. § 291(a) and designated regular active judges to the panel.

> ters subsequent to its constitution by the Chief Justice on September 19, 1972." (69a).

Had the panel followed the law of the Circuit as set down in *Pacente*, reversal and a new trial would have been required with the perjury count severed for separate trial.

It is the obligation of a panel of a circuit to follow the enunciated law of that circuit. An appointed outside panel can have no greater powers than a regular panel of the circuit, as is made clear in 28 U.S.C. § 296. The panel's decision not to be bound by any circuit law announced after its appointment makes no sense and no citations are given for this startling proposition. Of course, one panel of a circuit can conscientiously differ with another, and reconciliation of conflicting panel decisions is left to *in banc* hearing. But, in the first place, this panel did not even recognize an obligation to follow *in banc* decisions of the Seventh Circuit.[13] Moreover, in this case, Kerner was denied the right to an *in banc* review; his petition for rehearing *in banc* could not even be considered by the full court. All of the regular active judges disqualified themselves. Thus, the decision below stood in conflict with the law of the circuit with no way to resolve that conflict.

At the very least, Kerner's inability to obtain *in banc* review is a strong factor militating towards this Court's review of the panel's decision. Even more important, however, was Kerner's right to have his case decided under the law of the Circuit in which he was tried, and it makes no difference whether that law was decided before or after the panel was constituted.

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[13] At the time rehearing was considered, *Pacente* was awaiting *in banc* decision by the Seventh Circuit. Kerner asked the panel to defer its decision until the law of the circuit was decided *in banc*. It was in this context that the panel held that there was no need to wait for the outcome of *Pacente* because that decision would not be binding.

The panel also ignored settled circuit law announced before its constitution in favor of a Ninth Circuit rule to the contrary. As pointed out in Point III, the panel adopted the Ninth Circuit rule in *United States* v. *Roselli*, *supra*, that proof of a conspiracy does not require proof of an agreement to use interstate facilities, whereas the Seventh Circuit had decided in *United States* v. *Fellabaum*, *supra*, and in *United States* v. *Ruthstein*, *supra*, that interstate intent was an element of the crime for the reason set forth in Point III, *supra*. The decision of the panel below thus rejected Seventh Circuit law announced prior to its constitution and so the panel's reasoning that it is not bound by a decision subsequent to its creation cannot excuse its rejection of circuit law on this issue.

Unfortunately, as is evident upon reading the panel's decision, the panel felt no obligation to be bound by the law of any circuit. It felt free to indulge its eclecticism. Kerner is, at the least, entitled to a review of his case in accordance with the law of the land.

CONCLUSION

For all of the foregoing reasons, this petition should be granted.

Respectfully submitted,

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May 6, 1974

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1650

OTTO KERNER, JR.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

THEODORE J. ISAACS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

Nos. 73-1409 and 73-1410

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THEODORE J. ISAACS and
OTTO KERNER, JR.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 1086

ROBERT L. TAYLOR, District Judge for the Eastern District of Tennessee, sitting by designation.

ARGUED OCTOBER 23 and 24, 1973
DECIDED FEBRUARY 19, 1974

Before JOHNSEN, LUMBARD and BREITENSTEIN, *Senior Circuit Judges.**

PER CURIAM.

Following a six-week trial before a jury in the Northern District of Illinois, Theodore J. Isaacs and Otto Kerner, Jr., were found guilty on February 19, 1973 of a variety of offenses arising out of their activities on behalf of certain Illinois racing interests in return for bribes of

* Senior Judge Harvey M. Johnsen of the Eighth Circuit, Senior Judge J. Edward Lumbard of the Second Circuit and Senior Judge Jean S. Breitenstein of the Tenth Circuit, all sitting by designation.

more than $150,000 each. Isaacs and Kerner were both convicted on all those counts of an indictment which charged an 18 U.S.C. § 371 conspiracy to violate the Travel Act, 18 U.S.C. § 1952 and the Mail Fraud Act, 18 U.S.C. § 1341 (Count I); use of interstate facilities in furtherance of bribery, 18 U.S.C. § 1952 (Counts II through V) and mail fraud, 18 U.S.C. § 1341 (Counts VI through XIII). Kerner was also convicted of perjury before a grand jury, 18 U.S.C. § 1623 (Count XIV), false statements to Internal Revenue agents, 18 U.S.C. § 1001 (Count XV), tax evasion, 26 U.S.C. § 7201 (Count XVI) and false statement in a tax return, 26 U.S.C. § 7206(1) (Count XVII). Isaacs was also convicted of tax evasion, 26 U.S.C. § 7201 (Count XVIII), and false statement in a tax return, 26 U.S.C. § 7206(1) (Count XIX).

After considering post-trial motions, the district judge on April 19, 1973 dismissed five counts against each defendant, Counts V, VII, X, XI and XII. He sentenced both defendants to three years imprisonment and fines totalling $50,000, ($10,000 each on Counts I, II, III, and IV, and Count XVI as to Kerner, and Count XVII as to Isaacs), the prison sentences running concurrently on all remaining counts against each defendant, the fines accumulating consecutively on five counts against each defendant.

We affirm the convictions of Isaacs and Kerner on Counts I, VI, VIII, IX, and XIII, and reverse their convictions on Counts II, III, and IV. We also affirm the conviction of Kerner on Counts XIV, XV, XVI, and XVII and the conviction of Isaacs on Counts XVIII and XIX.

The indictment, returned December 15, 1971, named five defendants:

Isaacs, who had been Illinois Director of Revenue from 1961 to 1963 while Kerner was governor,

Kerner, who was governor of Illinois from 1961 until his resignation in 1968 to become a United States Circuit Judge,

Joseph Knight, Illinois Director of Financial Institutions, 1961 to 1968, while Kerner was governor,

William S. Miller, chairman of the Illinois Racing Board, IRB, by appointment of Kerner, and

Faith McInturf, Miller's secretary.

Joseph Knight was severed because of illness; he died after the trial. When Miller agreed to make full disclosure in August 1972 he and McInturf were granted immunity and the charges against them were ultimately dismissed. Miller testified; he and Marjorie L. Everett, on behalf of whose racing interests the bribery was allegedly undertaken, were the two principal government witnesses. Mrs. Everett was named as an unindicted coconspirator in the government's bill of particulars.

Our discussion of the numerous claims of error requires a summary of the evidence, from Kerner's campaign for election in 1960 to the disclosures and the investigations in 1969, 1970 and 1971.

For many years prior to 1960 Marjorie Lindheimer Everett had assisted her father, Benjamin Lindheimer, in the operation of his thoroughbred racing interests in the Chicago area. Lindheimer controlled Arlington Park Jockey Club which owned Arlington Park race track, and he also controlled Washington Park Jockey Club which owned Washington Park race track. Another entity in the picture is Balmoral Jockey Club, BJC, a racing company. Mrs. Everett owned some BJC stock at the time of her father's death and desired to continue his racing enterprises. Miller, a friend of Lindheimer and then a member of IRB, which at the time allocated thoroughbred racing dates, agreed to help her. Chicago Thoroughbred Enterprises, CTE, was organized and financed by bank loans of more than $8 million. CTE issued 3,000 shares of stock of which 2,000 went to Mrs. Everett who pledged them at the bank as collateral to secure the CTE loan. Arlington Park Jockey Club and Washington Park Jockey Club became divisions of CTE. The transactions in evidence relate to the acquisition and disposition, by Isaacs and Kerner, of stock in CTE, BJC, and a later formed company, Chicago Harness Racing Company, CHR.

Otto Kerner was the Democratic candidate for governor of Illinois in 1960. Miller assisted in financing his cam-

paign and, through Miller, Mrs. Everett's companies contributed $45,000 in cash to Kerner's campaign. It is not claimed by the government that any impropriety is attached to these contributions. Monies which Miller collected were given to Theodore Isaacs who managed Kerner's campaign. After Kerner's election, he appointed Isaacs as Director of the Department of Revenue and Miller as chairman of IRB. Isaacs invited Miller to suggest new members for appointment to the Racing Board and Mrs. Everett, through Miller, recommended the appointment of Ernest Marsh and Donald McKellar to the Racing Board and James Hayes to the Harness Racing Commission. Kerner made the appointments so recommended. Later, Miller and Mrs. Everett objected to the appointments of A. J. Monaco and David Meyers and those appointments were not made.

In 1961 Miller suggested to Mrs. Everett that she enter the field of harness racing to get more income from greater use of Arlington Park and Washington Park facilities. To accomplish this it was necessary to obtain legislation to permit one corporation to own two race tracks, to allow a racing company to conduct a meet at a track other than its own and to authorize a foreign corporation to own and operate race tracks in Illinois. Senate Bill 717, which approved such corporate actions, was lobbied through the Illinois legislature by Miller and it became law with Kerner's signature.

CTE spent over $5,000,000 to equip Washington Park for harness racing. Washington Park Trotting Association, WPTA, was organized to run the meets and it made a lease with CTE contingent upon the receipt of racing dates from the Harness Racing Commission. Rental was in the form of a percentage of the gross handle. WPTA stock was made available to various Illinois legislators and issued to nominees.

In 1962, Chicago Harness Racing, Inc., CHR, was organized by Mrs. Everett and Miller and had the same landlord-tenant relationship with CTE as did WPTA. The initial CHR stockholders were Chicago businessmen. The common shares were placed for a time in a voting trust to maintain the control of Mrs. Everett. Miller suggested to her that 50,000 shares of CHR stock be

made available for distribution to those who he thought might help the company. These 50,000 shares play a prominent part in subsequent events. Together, WPTA and CHR earned about $6,000,000 for CTE during the period 1962-1968.

According to Mrs. Everett, Miller informed her that Isaacs would act as liaison between Miller and Governor Kerner on racing matters. Miller thought it essential that she have a friend in the Kerner administration in order to ensure the award of racing dates at CTE's tracks and generally favorable consideration from the governor. While their testimony disagreed as to who initiated the subject, Mrs. Everett and Miller discussed the desirability of making racing stock available to Kerner and Isaacs. As a result, on November 8, 1962 Mrs. Everett sent Miller a handwritten note which read:

> Dear W S
>
> The following memo is to confirm our telephone conversation of today.
>
> At your earlier suggestion we have been holding:
>
> *For O.K.*
>
> | | |
> |---|---|
> | 25 shares of C.T.E. common | $25,000 |
> | 10,000 shares of W.P.T.A. common | $10,000 |
>
> *For T.I.*
>
> | | |
> |---|---|
> | 5 shares of C.T.E. common | $5,000 |
> | 2,000 shares of W.P.T.A. common | $2,000 |
>
> We did not issue the above as you had suggested that I hold this stock until we received further instructions from you.
>
> For your further information you will recall that the common stock of C.T.E. at the time of merger had a value of $1000 a share.
>
> I shall be pleased to either issue the above stock or hold it—or handle it in any manner you suggest.
>
> Kindest personal regards,
> Marj

The next day, November 9, Miller met with Kerner and Isaacs in the governor's Springfield office and told them of Mrs. Everett's stock offer. According to Miller, Kerner said "That's very nice of Marj." When Kerner took the stand he admitted seeing Miller on November

9 but denied that anything had been said about Mrs. Everett's offer of stock. Kerner testified that the only discussion at the meeting related to the racing dates that had been scheduled for the next year. However, the government evidence showed that the final racing dates were not scheduled until a board meeting on November 20. Kerner testified that he first heard of stock being available from Joseph Knight and he agreed to invest in it on Knight's recommendation. However, it is undisputed that nothing was done to set aside the stock or to take it up until four years later in the summer of 1966. At the time of Mrs. Everett's November 1962 offer of CTE stock at $1,000 a share it was worth $2,500 a share.

Isaacs approached Miller on a number of occcasions wanting to know when the promised stock would be made available. In December 1963 or January 1964, Miller handed over to Isaacs Mrs. Everett's November 8 note. Although the note had specified the number and types of shares to be received by the defendants, Miller testified at trial that the commitment was considered flexible with the exact number of shares and the particular companies in which an interest would be awarded not definitely settled. Thus, for example, the share of Isaacs was subsequently changed from 5 to 25 shares of CTE, although the reasons for this increase were not explained at trial.

In the spring of 1964 Kerner was confronted with the problem of the allocation of racing dates to Maywood Park Trotting Association, a competitor of Mrs. Everett's enterprises. Miller had corresponded with Kerner, informing him that Maywood had been engaging in fraudulent practices. Thomas Bradley, who was Chairman of the Harness Racing Commission at the time, testified that Kerner had been deeply involved in the allocation of racing dates to Maywood. According to Bradley, he had been contacted by Kerner who arranged a meeting at which they discussed Maywood's future. Kerner indicated that Maywood had become insolvent and had been taken over by "wrong people." But Bradley took issue with Kerner's characterization of Maywood's financial condition, asserting that, in fact, it was being run by a reputable family and was in the process of substantial renovation. Despite these remarks, Kerner ordered Bradley to "cancel the dates" that the Harness Racing Commission

had set aside for Maywood for the fall of 1964 and to reassign them to Sportsman's Park and Washington Park, the latter a division of CTE, controlled by Mrs. Everett. When Bradley adamantly refused to do this, Kerner responded: "Well, now, Tom, this is an order."

Bradley testified that, instead of obeying Kerner's order, he chose to hold hearings and audit Maywood's books. The picture which emerged from the hearings and audit was that Maywood was entitled to the fall 1964 racing dates that had been tentatively assigned it. A transcript of the hearings was sent to Kerner, who refused to meet with Bradley and requested his resignation, which was submitted shortly thereafter.

When Kerner took the stand, he disputed Bradley's account of the Maywood incident. He denied ever having had any private meeting with Bradley or ordering the reassignment of racing dates to Sportsman's and Washington Parks. Kerner did admit that he had a meeting in the spring of 1964 with the entire Harness Racing Commission, and that at this meeting the question of Maywood's probable insolvency had been discussed. He testified that his concern over Maywood's insolvency was prompted by reports from several sources concerning its poor financial condition and that he feared that if these reports proved true then Illinois would lose revenue it obtained in the form of a share of the take from Maywood's operations. Kerner requested that the members of the Board determine the accuracy of reports of Maywood's insolvency.

In 1964 Kerner successfully ran for reelection as governor. Mrs. Everett made a $15,000 cash contribution to his campaign which was delivered by Miller to Kerner. Here again no question is raised as to the propriety of the contribution.

In late 1964, a second dispute arose over the allocation of racing dates. Egyptian Trotting Association, one of CTE's Washington Park tenants, had been tentatively allocated the same fall dates for the 1965 season that it had been assigned the previous year. These late fall dates were highly desirable since they included days on which there would be no competition from thoroughbred racing. Clyde Lee, Executive Director of Egyptian, testi-

fied that after hearing rumors that Egyptian's dates might, in fact, be awarded to Maywood in 1965, he arranged a meeting with Kerner. At this meeting, he told Kerner that while he did not want to exert pressure on the governor, he would appreciate Egyptian's retaining the late fall dates. According to Lee, Kerner acknowledged that he "was in the middle of the thing and would probably have to make the decision."

Lee testified that he was not satisfied with Kerner's response and flew down to Florida to see Mrs. Everett, who had a direct stake since her company, CTE, leased the Washington Park race track to Egyptian and received a percentage of the handle. After Lee told her about his conversation with the governor, Mrs. Everett immediately contacted James Hayes and told him she wanted Egyptian to retain the late fall dates. But Hayes was in the hospital and meanwhile the only active member of the three-man commission, Walter Murphy, was taking steps to award the dates to Maywood.

Murphy eventually came to see Kerner, complaining that he could not get Hayes to sign the orders awarding the fall 1965 dates. Kerner indicated that, if he tried again, Hayes would in fact approve the orders. Murphy followed Kerner's instructions and Hayes, as had been promised, agreed. Although Egyptian did not get the specific dates it had requested, it was allocated six additional dates, which, of course, meant increased revenues. When Kerner took the stand, he denied any recollection of dealings with Lee or involvement in the allocation of racing dates to Egyptian. He admitted having spoken with Murphy, but testified that he had merely suggested to him that Hayes might change his position if approached again. He denied further personal involvement in the matter.

In 1965 legislation was approved by the Illinois House of Representatives (Bills 1186 and 1187) which was designed to increase state revenues at the expense of race track operators, by increasing the state's receipts from thoroughbred and harness racing. Racing interests, including Mrs. Everett, were strongly opposed to these measures. On May 5, 1965, according to Clyde Lee, he met with Kerner, Paul Powell, the Secretary of State of

Illinois, and then State Senator William Lynch, Mrs. Everett's attorney. Kerner was shown schedules prepared by Mrs. Everett's accountants indicating that the legislation might have a disastrous effect on certain harness racing companies. Lee testified that Kerner stated that he would consider the matter "and let [them] know something." Not long after, Kerner met with Miller and Isaacs. Miller suggested alternative legislation involving a less severe impact on the racing companies. Kerner and Isaacs agreed that the original legislation would be detrimental to the state and the racing associations. With Miller's active support and lobbying, revised legislation was enacted which significantly reduced the burden originally contemplated by the Illinois House of Representatives. Kerner signed the bill into law.

On direct examination, Kerner disputed Lee's account of events. Kerner testified that he could not recall having met with Lee, Powell, Miller, and Lynch. Additionally, on cross-examination, he stated that he, in fact, had supported the original legislation, accepting the watered-down version only when it was clear that the harsher original legislation would not pass the Senate. He testified that he had insisted throughout that there be some legislation resulting in an increase in revenues from racing.

In August of 1965 Kerner signed into law a bill which abolished the Harness Racing Commission, which had proved so troublesome under Thomas Bradley's chairmanship. In its place, the Racing Board was given jurisdiction over both thoroughbred and harness racing and expanded to seven members. Among those appointed to the enlarged Board were Miller, as chairman, and Ernest Marsh and Donald McKellar, both originally appointed to the Board by Kerner at the beginning of his first term on the recommendation of Mrs. Everett. Also appointed as members were Crowdus Baker, Roy Tuchbreiter, Charles F. Murphy, Sr., and Kenneth Clark. Apart from Clark, all the others were names suggested to Kerner by Miller after he had had discussions with Mrs. Everett and Isaacs. Indeed, both Tuchbreiter and Baker had earlier been associated with CTE and its affiliates.

An Illinois law enacted in 1965, Ill. Rev. Stat., Ch. 8, § 37(a)(1)(1965), prohibited members of the Racing Board

from maintaining any interest in a harness racing company. Thus Miller, as chairman of the Board, found himself in late 1965 in the position of having to dispose of 50,000 shares of CHR which had been allocated to him at the company's formation in 1962. Eventually 28,000 of the shares came into the possession of Isaacs and Kerner. The 50,000 CHR shares had come into Miller's hands through a series of events extending back to 1962 when Joseph Knight informed Miller that he and "his friends" were displeased that they had not been offered interests in race track stock as had many legislators. Miller relayed this message to Mrs. Everett, who in the summer of 1963 made available 50,000 shares of CHR. The shares were obtained by engineering a CHR stock split over the objections of the board chairman, Modie Spiegel, who protested the dilution of his interest in a letter to Mrs. Everett in which he also complained that he had been "informed that it was imperative to have others receive [CHR] stock in order to get CHR its [racing] dates."

To finance the acquisition of the stock, Miller had had his secretary, Faith McInturf, draft a $20,000 check to Ralph Atlass, who had been chosen by Mrs. Everett to be the nominee for Miller's 50,000 shares. Upon receiving Miller's check, Atlass deposited it, drafted his own check for $20,000 and delivered it to Albert Bell, CHR secretary. Atlass received a voting trust certificate for 50,000 shares, CHR stock at the time being held entirely in a voting trust controlled by Mrs. Everett. On termination of this trust, Atlass received a single 50,000 share certificate which he presented to Miller on May 6, 1965. That same day, Miller called Knight and told him that the shares he had requested were available. Knight, however, was unprepared to pay for them. The two agreed, pursuant to Knight's suggestion, that Miller would open a numbered account at Sincere & Co., a brokerage house. This account, #206, was credited with $4,800 from Knight and 38,000 shares of CHR stock, and 12,000 shares went into account #208, which was Knight's account. Immediately thereafter, CHR issued twelve 1,000 share certificates and one 26,000 share certificate to replace the single 38,000 share certificate.

In January 1966, not long after the new certificates had been delivered by CHR to Sincere & Co., Isaacs in-

formed Miller that "the old man and I are irritated about that delay in receiving Marj's [CTE] stock." Miller promised to contact Mrs. Everett at once. When given Isaacs' message, Mrs. Everett commented that she would do something about it as soon as possible.

At the time, Mrs. Everett had most of her shares of CTE tied up in a single 2,000 share certificate pledged as collateral at the First National Bank on CTE's multi-million dollar loan. She received permission from the bank temporarily to withdraw 50 shares on the condition that she would eventually return them. On February 8, 1966, two 25 share certificates were sent to her attorney, William Lynch. Not long after, toward the end of February, Miller met with Isaacs on a Florida golf course and informed him that the CTE shares were available at Lynch's office. Isaacs expressed satisfaction, but indicated that he wanted to look into the tax consequences.

In March of 1966 Isaacs met with Knight again to arrange for the acquisition of the stocks. Knight told Miller shortly thereafter, however, that neither he nor Isaacs had sufficient cash to complete the transactions. Miller suggested that Knight see his secretary, Faith McInturf, to arrange a "loan." Knight contacted McInturf and a $40,000 "loan" was arranged.

On August 10, 1966 Miller, Knight and Isaacs met with George Schaller, an attorney for Mrs. Everett's racing enterprises. Schaller, on behalf of Mrs. Everett, tendered to Isaacs the two 25 share certificates that he, Schaller, had received from William Lynch. In return, Schaller received Isaacs' promissory note and two checks. The note was backdated to November 12, 1962 and promised to pay $50,000 at 5% simple interest. The CTE shares were pledged as security. The two checks given to Schaller were made payable to Mrs. Everett and drawn on Isaacs' personal account in the sums of $50,000 and $8,958. Isaacs presented the $8,958 check as "interest" although according to Mrs. Everett she had never discussed a loan with Isaacs or Kerner. Schaller marked the note paid and gave it to Isaacs and the CTE certificates were given to Miller. At this time a share of CTE was worth $6,000.

At the request of Miller and Isaacs, Mrs. Everett sent to Isaacs, after the August 10 meeting, a letter, backdated to November 12, 1962, which purported to confirm the purchase of 50 shares of CTE at $1,000 per share. The letter stated that Mrs. Everett would hold the shares as collateral for Isaacs' note to her for $50,000 bearing interest at 5%, and due on or before November 15, 1966.

The funds which Isaacs had given to Schaller for the CTE shares had come in large part for the $40,000 that Faith McInturf had "loaned" to Knight. After depositing McInturf's check, Knight had drawn a check for the same amount payable to Isaacs. Isaacs deposited the $40,000 check from Knight to his account as well as a $5,000 check to cash from Kerner. On the deposit slip accompanying this check, Isaacs typed: "Repayment to TJI of advance payment of 25 CTE, balance owing to TJI is $20,000 plus interest at 5% from July 15, 1966."

In addition to the $45,000 from the Knight and Kerner checks, Isaacs contributed $5,000 of his own funds to cover the $50,000 check given to Mrs. Everett for the 50 shares of CTE. The other check given by Isaacs to Schaller was for $8,958 payable to Mrs. Everett, and represented interest on the fictitious loan. No interest was due and the payment thereof ostensibly gave the appearance of legitimacy to the backdated note. One-half of the $8,950 came from Kerner who originally sent it erroneously to Mrs. Everett. She called Miller, who told her to send the check to him for transmittal to Isaacs. Later Kerner sent an IRS form 1099 to Mrs. Everett, reporting the interest payment by him. (The mailing of this form is the basis for Count VI, one of the Mail Fraud counts.)

We turn now to the manner in which $40,000 was generated in order to pay off the McInturf "loan." On July 19, 1966 Kerner issued a $5,600 check to cash. The check eventually reached Isaacs who proceeded to use it to purchase a Civic Center Bank cashier's check #358 for the same amount made payable to Knight. On the reverse side of the receipt for the cashier's check, Isaacs wrote: "O.K.'s ½ of W.P.T. pchse. of 11/12/62 with Chicago Harness substituted for W. P. Trott, by agreement resulting from error in failure to purchase W.P.T.

shares according to agreement of Nov. 1962." Isaacs added his own $5,600 check and together these two checks were deposited in Knight's account, as reimbursement for an $11,200 outlay which Knight had deposited more than two weeks earlier in Miller's Sincere & Co. account and which was equal to the price of the 28,000 CHR shares allocated to Isaacs and Kerner.

Later, the two 14,000 share certificates destined for Isaacs and Kerner were transferred from Sincere's name to that of Knight. In early October, Knight wrote George Schaller and requested that he become nominee because of Knight's own poor health. Knight did not mention in his letter who the beneficial owners were, but Schaller agreed to act as nominee upon Mrs. Everett's request that he do so.

In the fall of 1966, CTE and CHR filed applications for 1967 racing dates with IRB. CTE submitted applications on behalf of its two subsidiaries, Arlington Park and Washington Park jockey clubs. On the application, Mrs. Everett was listed as the owner of 2,000 CTE shares, although Isaacs and Kerner, in fact, each beneficially owned 25 of these shares. Similarly, CHR's application represented that Schaller owned 38,000 shares, although Isaacs and Kerner were each the beneficial owners of 14,000 of those shares. These statements were made even though the page on which the holdings were listed notified the applicant that

> Dummy Holdings must be indicated, and the real parties owning the equity therein must also be stated.

The racing dates requested were granted to CTE and CHR on the basis of their inaccurate reports.

In February 1967, CHR declared a 20¢ per share dividend, so that Isaacs and Kerner each became entitled to $2,800. Knight wrote Schaller requesting that he "pay such dividend to the true owners thereof, whose identity I have disclosed to you orally." Isaacs, according to Schaller's testimony, shortly thereafter visited him and told him to write two personal checks, one payable to Isaacs and one to Kerner. After informing Mrs. Everett, Schaller deposited the two dividend checks in his account

and then drafted two checks each in the amount of $2,800 payable to Isaacs and Kerner. These checks were then deposited by Isaacs and Kerner in their accounts. (The mailing by Kerner of his check for deposit was the basis for Count IX, Mail Fraud.)

Two months later, Miller, who had stepped down from his position as Chairman of IRB, was asked by a long-time friend, Joseph Becker, whether he knew of any race track stock for sale. Miller proceeded to arrange a deal whereby Becker and his brother would purchase the 28,000 shares of CHR held by Schaller as nominee for Isaacs and Kerner. At Joseph Knight's direction and with Isaacs' express approval, Schaller agreed to sell the stock to the Beckers. Joseph Becker was directed by Miller or his secretary, Faith McInturf, to draft two checks for $28,000 payable to Schaller. On May 17, these checks were presented to Faith McInturf. Schaller eventually received them, deposited them in his personal account and then drew two personal checks payable to Joseph Knight and delivered them to Isaacs. Isaacs delivered the checks to Knight who deposited them in his account and then issued three checks, one payable to Isaacs for $7,000, one to Kerner for the same amount, and a $41,642.48 check to Faith McInturf as repayment for her earlier $40,000 advance, which had enabled the August 1966 acquisition of the 50 CTE shares, plus interest thereon. These checks were deposited by Isaacs, Kerner and McInturf in their respective accounts, with the check to Kerner then sent by his bank to a central depository bank. (This was the basis for the mail fraud charged in Count VIII.) Eventually all three checks deposited cleared through the Federal Reserve Bank in St. Louis, Missouri. (These transactions are the basis for violations of the Travel Act, 18 U.S.C. § 1952, charged in Counts II, III, IV)

Mrs. Everett still had an obligation to return the 50 CTE shares to the First National Bank where they had originally been held as part of the 2,000 share collateral on the multi-million dollar loan. The First National Bank authorized her to exchange 10,000 BJC shares, also held by the bank as collateral, for the 50 outstanding CTE shares. BJC was a thoroughbred racing company controlled by Mrs. Everett, Miller and CTE, and ran its

meets as a tenant of CTE. Miller and Issacs agreed to exchange the CTE shares he and Kerner beneficially owned for 10,000 BJC shares. On May 12, 1967 the exchange took place. The BJC shares were put in the name of Knight, once again acting as nominee for Isaacs and Kerner.

Miller had gained control of CHR. With funds obtained from the company he was able on June 22, 1967 to acquire a controlling interest in BJC. As chairman of BJC's Executive Committee, he submitted an application for 1968 racing dates to the Racing Board which failed to reveal Isaacs' and Kerner's beneficial ownership of BJC stock. On the basis of this misleading application, the Racing Board granted the dates applied for, sending a race date acceptance form to Miller on November 27, 1967. (This mailing was the basis of the mail fraud charged in Count XIII)

Miller subsequently took steps to acquire Isaacs' and Kerner's BJC shares. Faith McInturf drafted a $300,000 CHR check dated March 26, 1968, payable to Knight, in return for the 10,000 BJC shares beneficially owned by the defendants. Knight endorsed this check in blank and gave it to Isaacs, who arranged with the Civic Center Bank, whose attorney he was, to negotiate it without an endorsement, although this was contrary to normal bank procedures. Isaacs deposited $135,000 in his checking account and a similar amount in a new checking account opened for Kerner. Then he deposited $15,000 each in two new savings accounts, which he had opened for himself and Kerner.

The end result of all these transactions was that Isaacs and Kerner had each gained $159,800 from sales and dividends, and were each out of pocket only $15,079 each.

The record shows that during the period in question no competitor of Mrs. Everett lost any racing dates. The only gain in dates was that of the additional six days for Egyptian, a tenant of her enterprises. State revenues from horse racing increased from $19.6 million in 1961 to $40 million in 1968. During the same period Mrs. Everett's enterprises flourished. She eventually disposed of her Illinois racing interests, which she valued at $20 million, by taking bonds in Gulf and Western Industries.

In his tax return for the year 1967, Isaacs reported that he had acquired 14,000 shares of "Chicago Co." on July 13, 1966 at a cost of $5,600 and had sold the stock on May 25, 1967 for $28,000; and that he had acquired 25 shares of "Bajo Co." on November 12, 1962 for $25,000 and had sold them on May 12, 1967 for $150,000. In his return for the tax year 1967, Kerner reported that he had acquired 14,000 shares of "Chicago Co." on July 13, 1966 for $5,600 and had sold them on May 25, 1967 for $28,000. Kerner also reported an item identified as "as Exchange C.T. Co. for 5,000 Balmoral" with an acquisition date of November 20, 1962 for $25,000 and a sale date of May 12, 1967 for $150,000. Isaacs and Kerner each treated these items as long-term capital gains. The government asserted, however, that the items referred to were the CHR and CTE stocks which had been acquired in 1966 and had then had a value of $28,000 and $150,000 respectively. According to the government, these had been bribes and were thus taxable as ordinary income in 1966. At the trial the government tax expert testified that treatment of the items as the receipt of bribes, and hence taxable as ordinary income in 1966, would result in a tax deficiency for Kerner of over $83,000 and for Isaacs of over $87,000. (Count XVI charged Kerner with income tax evasion in violation of 26 U.S.C. § 7201. Count XVII charged him with false statements on a return in violation of 26 U.S.C. § 7206(1). Isaacs was similarly charged in Counts XVIII and XIX)

In her tax return for 1966, Mrs. Everett claimed a long-term capital loss on the sale of the 50 CTE shares. After the IRS had begun an investigation of her return, she disclosed in 1969 her knowledge of the transactions which had occurred and provided her records.

In the ensuing investigation, Kerner, who had resigned as governor in 1968 to take office as a United States Circuit Judge for the Seventh Circuit, was visited in his chambers, on July 15, 1970, by two IRS special agents who told him that he was under criminal investigation for income tax violations, and gave him the Miranda warning. Agent Stufflebeam asked Kerner to identify the "Chicago Co." listed on the 1967 return. Kerner said that it was a financial institution, that he had purchased the

stock on the advice of his broker, and that a friend of his, Isidore Brown, was a corporate officer. The facts were that Chicago Co. was privately owned, that Kerner had never owned any of its stock, and that Isidore Brown had never been involved with that company. Kerner also told the agents that the Chicago Co. transaction did not refer to Chicago Harness Racing Company and that his only transactions in racing stock involved the CTE-BJC transactions. (These statements formed the basis for Count XV, which charged the making of false statements in violation of 18 U.S.C. § 1001)

After the federal grand jury commenced its investigation of Illinois racing operations, Kerner requested to appear. During his lengthy testimony in June 1971 he specifically denied ordering Bradley to withdraw Maywood's 1964 racing dates and denied the conversation with Lee regarding the Egyptian racing dates. (Count XIV, the perjury count, is based on these statement before the grand jury)

As stated above, Kerner testified in his own behalf, explained at length his version of the various transactions, and specifically denied that he accepted a bribe or did anything to deprive the people of Illinois of their right to honest, good government. Isaacs did not testify. With relation to the income tax counts, the defendants showed that their tax returns were prepared by their accountants on whom they relied. In addition, fifteen character witnesses testified for Kerner.

The principal points presented for review are as follows:

I. The jurisdiction of the district court to try a federal judge upon an indictment prior to removal from office by impeachment.

II. Sufficiency of the evidence of bribery.

III. Validity of the convictions under the Travel Act counts.

IV. Validity of the convictions under the Mail Fraud counts.

V. Validity of the convictions on the conspiracy count.

VI. Validity of Kerner's conviction under the perjury count.

VII. Validity of Kerner's conviction under the false statement count.
VIII. Questions relating to joinder.
IX. Questions relating to severance.
X. Miscellaneous, including questions regarding admission of evidence.
XI. The charge to the jury.
XII. Summations of government counsel.

I. *The jurisdiction of the district court to try a federal judge upon an indictment prior to removal from office by impeachment.*

Kerner became a United States Circuit Judge for the Seventh Judicial Circuit on May 20, 1968, 390 F.2d xv, and still holds that office. The conspiracy count covers a period beginning prior to 1961 and continuing to the date of the return of the indictment with one overt act related to conduct in 1970. The perjury count and the § 1001 count cover matters occurring after he took office as a federal judge. All other counts relate to offenses that precede that event.

The question is whether a court has jurisdiction to try a federal judge upon an indictment before his removal from office by the impeachment process. This point was not raised in the trial court and is presented for the first time on this appeal.

Rule 12(b)(2), F.R. Crim. P., provides that defenses and objections based on defects in the institution of the prosecution or in the indictment, other than a failure to show jurisdiction or charge an offense, may be made by motion before trial and, if not made, are thereafter waived. Lack of jurisdiction may be noticed at any time during the pendency of the prosecution. The first problem is whether we are concerned with personal or subject-matter jurisdiction. Personal jurisdiction may be waived by failure to challenge but subject-matter jurisdiction may not. *Sewell* v. *United States*, 8 Cir., 406 F.2d 1289, 1292, and *Pon* v. *United States*, 1 Cir., 168 F.2d 373, 374; see also *Ford* v. *United States*, 273 U.S. 593, 606,

Kerner argues that the provisions of Articles I and II of the Constitution relating to impeachment provide the only means of removing a judge from office, and, because conviction on criminal charges is tantamount to removal from office, federal courts are without jurisdiction over the person. The real basis for the argument is the claim of a constitutional privilege or immunity. That claim goes to the power of the court to act, and hence pertains to subject-matter jurisdiction. *Cooper* v. *Reynolds*, 77 U.S. 308, 316-317; *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 305-307; *Farmers Elevator Mutual Ins. Co.* v. *Carl J. Austad & Sons, Inc.*, 8 Cir., 343 F.2d 7, 11; *West Coast Exploration Co.* v. *McKay*, D.C. Cir., 213 F.2d 582, 591, cert. denied 347 U.S. 989; and *United States* v. *New York & O.S.S. Co.*, 2 Cir., 216 Fed. 61, 66.

Glidden Company v. *Zdanok*, 370 U.S. 530, 535-537, was concerned with the authority of judges of special federal courts to sit by designation in federal courts of general jurisdiction. The contention was that the special courts are created under Art. I of the Constitution and hence their judges may not sit on Art. III courts. The point was not presented in the trial court but was raised for the first time on appeal. The government argued that the de facto doctrine precluded consideration of the judges' authority for the first time on appeal. The Supreme Court recognized the "obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." 370 U.S. at 535. However, the Court pointed out that when the defect is not merely technical but embodies a strong policy affecting judicial administration, the Court has treated the defect as jurisdictional and considered it though not raised at the earliest opportunity. 370 U.S. at 536. The Court went on to say that. "*A fortiori* is this so when the challenge is based upon nonfrivolous constitutional grounds." Ibid. The Court noted that the existence of diversity of citizenship could be considered for the first time in the Supreme Court, *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U.S. 379, 382, and *City of Gainesville* v. *Brown-Crummer Investment Co.*, 277 U.S. 54, 59, and held that the attack on the constitutional authority of the judges should be heard even though not raised in the trial court. 370 U.S. at 537.

Kerner's challenge is on nonfrivolous constitutional grounds. It relates to the power of the court to act and hence is concerned with subject-matter jurisdiction, which under Rule 12(b)(2), F.R.Crim.P., may be raised at any time. Accordingly, we must consider the jurisdictional issue on its merits.

An examination of the textual references to impeachment in the Constitution reveals the following. The House of Representatives is given the sole power of impeachment. Art. I, § 2. The Senate is given the sole power to try all impeachments. Art. I, § 3. A conviction on impeachment cannot go beyond removal from office and disqualification to hold future offices. Art. I, § 3. Conviction on impeachment does not bar subsequent criminal proceedings against the offender. Art. I, § 3. The President has no power to grant pardons in cases of impeachment. Art. II, § 2. To be removed from office on impeachment, the President, Vice-President, and any civil officer of the United States must be convicted of treason, bribery, or other high crimes and misdemeanors. Art. II, § 4. The impeachment process proceeds without trial by jury. Art. III, § 2. Three other provisions, which do not expressly concern impeachment, must be considered. Members of Congress are privileged from arrest during sessions, except for treason, felony, and breach of the peace, and may not be questioned for any speech or debate in Congress. Art. I, § 6. Federal judges hold their offices during good behavior. Art. III, § 1.

The historical background of the pertinent constitutional provisions has been thoroughly explored and analyzed by many scholars. See e.g. R. Berger, Impeachment: The Constitutional Problems; I. Brant, Impeachment, Trials and Errors; B. Shartel, Federal Judges—Appointment, Supervision, and Removal— Some Possibilities Under the Constitution, 28 Mich. L. Rev. 870; Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 The Supreme Court Review 135; P. Kurland, The Constitution and the Tenure of Federal Judges: Some Notes from History, 36 University of Chicago L. Rev. 665; and Keeffe, Explorations in the Wonderland of Impeachment, 59 Am. Bar Ass'n Journal 885. Any reexamination of this esoteric subject by us would serve no good purpose.

The Constitution does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office. The provision of Art. I, § 3, cl. 7, that an impeached person is "subject to Indictment, Trial, Judgment and Punishment, according to Law" does not mean that the person may not be indicted and tried without impeachment first. The purpose of the phrase may be to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy, or it may be be to differentiate the provisions of the Constitution from the English practice of impeachment. R. Berger, supra at 78-80, citing 1 J. Wilson, Works 324 (McCloskey ed.); 14 Annals of Cong. 423 (1805) (giving an interpretation of the clause by L. Martin, a member of the Constitutional Convention.)

The provision of Art. III, § 1, that federal judges "shall hold their Offices during good Behavior", which had a recognized common law meaning and which was accompanied at common law by a procedure for its effectuation, serves as a limitation on the tenure of federal judges. R. Berger, supra at 125-128. No clause in the Constitution is without meaning. *Marbury* v. *Madison*, 5 U.S. 137, 174, and *Holmes* v. *Jennison*, 39 U.S. 540, 571. The inclusion of the tenure provision does not permit impeachment for conduct less than that which triggers the impeachment provisions of Articles I and II. By the same token it does not exclude prosecution for crime. Protection of tenure is not a license to commit crime or a forgiveness of crimes committed before taking office. Otherwise, a person upon assuming federal judicial office would receive amnesty and would not be accountable for his misdeeds, whenever they occurred. We believe that the framers of the Constitution did not intend such a result.

Our conclusion is supported by contemporaneous construction of the Constitution. The First Congress passed § 21 of the Act of April 30, 1790, now 18 U.S.C. § 201, which provided that a judge convicted of accepting a bribe is thereby disqualified to hold office. Thus the members of the Congress who must have been acutely aware of the provisions of the Constitution and the debate which preceded their adoption construed the Constitution to permit the removal of a judge without impeachment.

In 1796, the House of Representatives referred to the Attorney General serious charges against a territorial judge. The Attorney General ruled that the judge could be prosecuted by information, indictment, or impeachment. See Shartel, supra, at 885, n. 40. The fact that the judge in question was an Art. I, rather than an Art. III, judge does not provide a persuasive distinction. They are both civil officers. The Attorney General advised the House that the judge could be prosecuted by information, indictment, or impeachment and recommended information, indictment, or impeachment and recommended information or indictment as cheaper and easier. The House took no action on the Attorney General's report.

The Jeffersonian Congress in 1802, by repealing the 1801 Judiciary Act and thereby throwing the so-called midnight judges out of office, did so on the constitutional premise that it could remove judges. The fact that after *Marbury* v. *Madison,* 5 U.S. 137, the judges gave up and never sued to retain their offices proves nothing. The interesting fact is that this early Congress acted as it did.

Turning the pages of history, the Supreme Court said in an 1882 decision, *United States* v. *Lee*, 106 U.S. 196, 220, that:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

In *Burton* v. *United States,* 202 U.S. 344, a United States Senator was convicted, among other things, of of having taken a bribe in violation of what is now 18 U.S.C. § 201. He argued that conviction would expel him from the Senate and that under the Constitution the Senate and that under the Constitution the Senate had sole power of expulsion. The Court rejected the conten-

tion, quoted with approval from *United States* v. *Lee*, and found no violation of the principle of separation of powers.

In *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74, Mr. Justice Douglas said in his dissenting opinion, Ibid. at 140: "If they [federal judges] break a law, they can be prosecuted." Mr. Justice Black in his dissent said, Ibid. at 141, that "• • • judges, like other people, can be tried, convicted, and punished for crimes • • •."

In *United States* v. *Brewster*, 408 U.S. 501, a Senator was charged with a § 201 violation. The trial court held that the Speech or Debate Clause precluded criminal prosecution. The Supreme Court reversed and found no constitutional violation. The Court said, 408 U.S. at 520:

> The sweeping claims of appellee would render Members of Congress virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office. Such claims are inconsistent with the reading this Court has given, not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6.

Gravel v. *United States*, 408 U.S. 606, was concerned with the validity of a subpoena requiring the assistant of a Senator to appear as a witness before a federal grand jury. The Senator intervened and asserted a violation of his constitutional privileges. With reference to the Freedom from Arrest Clause, the Court said, 408 U.S. at 615:

> It is, therefore, sufficiently plain that the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws, even though imprisonment may prevent or interfere with the performance of their duties as Members. • • • Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.

Finally, we have *O'Shea* v. *Littleton*, 42 LW 4139, decided January 15, 1974. The Court, although its language was

general and perhaps dictum, touched on the vulnerability of judges to criminal process, and said, 42 LW 4139, 4144:

> • • • we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339 (1879). On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress • • •' Gravel v. United States, 408 U.S. 606, 627 (1972).

Kerner's argument for the privilege which he claims, is not supported by "the precise words used in any prior case, and surely not on the sense of those cases, fairly read." Brewster, 408 U.S. at 516. We conclude that whatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government. Historically, the impeachment process has proven to be cumbersome and fraught with political overtones. We believe that the independence of the judiciary is better served when criminal charges against its members are tried in a court rather than in Congress. With a court trial, a judge is assured of the protections given to all those charged with criminal conduct. The issues are heard in a calm and reasoned manner and are subject to the rules of evidence, the presumption of innocence, and other safeguards. 408 U.S. at 519-520.

Kerner argues that trial and conviction of a federal judge frustrates the separation of powers concept because the executive branch would indict and prosecute. The Constitution makes all "civil officers" subject to impeachment. The issue, then, is whether any civil officer is subject to pre-impeachment indictment. This presents no separation problem. Brewster points out, 408 U.S. at 522, n. 16, the barriers, such as indictment, burden of proof,

and presumption of innocence, which a prosecutor must face. With co-equal branches of government, the potential of abuse by any one of them is inherent. However, the system of checks and balances, a free press, and public resentment toward any attempted domination all work to preserve the guaranteed independence of each branch.

On the basis of the text of the Constitution, its background, its contemporaneous construction, and the pragmatic consequences of its provisions on impeachment, we are convinced that a federal judge is subject to indictment and trial before impeachment and that the district court had jurisdiction to try defendant Kerner.

II. *Sufficiency of the Evidence of Bribery.*

A basic question is whether the evidence suffices to show that the transactions in question were for the improper purpose of influencing official conduct. The conspiracy count charges an agreement to violate the Travel Act by the use of interstate facilities to distribute the proceeds of bribery, and to violate the Mail Fraud Act by the use of the United States mails in furtherance of a scheme to defraud the State of Illinois and its citizens of their right to have the administration and execution of its laws free from corruption and fraud. The tax counts are bottomed on the theory that the defendants received ordinary income in the form of bribes rather than long-term capital gains resulting from business investments.

The defendants say that the stock acquisitions were legitimate business transactions unrelated to any attempt to influence official conduct and that their conduct was within the realm of propriety. The government contends, and the jury by its verdicts must have found, that the evidence established that Mrs. Everett and Miller offered the stock with a corrupt intent, that Isaacs and Kerner received the stock with knowledge of that intent, and the result was the improper influencing of official conduct.

The Travel Act, 18 U.S.C. § 1952, makes it unlawful to use any facility in interstate commerce to distribute the proceeds of an unlawful activity. The latter phrase is defined to include bribery in violation of the laws of

the state in which committed. The indictment alleges bribery in violation of Ill. Rev. Stat., Ch. 38, § 33-1. Subsection 33-1(d) provides that bribery occurs when property is accepted by a public official with knowledge that it is offered with intent to influence the performance of any act related to his public position. No particular act need be contemplated by the offeror or offeree. There is bribery if the offer is made with intent that the offeree act favorably to the offeror when necessary. See *People* v. *Woodruff*, Ill., 137 N.E. 2d 809; cf. *People* v. *Rizzo*, Ill., 194 N.E. 2d 205, and *Commonwealth* v. *Lapham*, Mass., 31 N.E. 638, 639.

Isaacs and Kerner contend that they purchased the stock in 1962 at the stated price; that the stock was pledged as collateral for a loan and could not be delivered immediately; and that they paid the agreed purchase price when the stock was ready for delivery in 1966. Alternatively, they claim that if the November 9, 1962, transaction was not a sale then it was an option to buy, that is, a legal commitment by Mrs. Everett to sell the stock to them at the mentioned price.

Kerner denied the November 9, 1962, conversation with Miller relative to the stock offer. He admitted the meeting with Miller. Indeed, it is shown in Kerner's diary. Kerner testified that the only purpose of the meeting was to learn from Miller the racing dates that had been scheduled for the next year. The evidence was that no final racing dates were scheduled until a board meeting on November 20. If the stock offer was not discussed at the November 9 meeting, then the only basis for the defendants' claim of a 1962 commitment by Mrs. Everett is the 1966 Isaacs note and Everett letter, which were admittedly backdated to 1962, and furnish frail support to the claim of an ordinary business transaction. The effort to camouflage the transaction by the payment of interest on a fictitious note discredits the claim of a legitimate business transaction.

The record sustains a finding that an offer was made. It is not contested that property, the 50 CTE shares, was acquired at a fraction of its true worth. This brings us to the question of the intent of the offeror and the

knowledge of the offerees of that intent. Miller testified that he made the stock offer with intent "to cause him [Kerner] to continue to look favorably upon Mrs. Everett and her enterprises." Before the offer Kerner had signed the legislation which made possible the CTE operations. After the offer, he approved legislation supported by Mrs. Everett and others interested in racing. The evidence established that appointments to the regulatory bodies approved by Mrs. Everett and Miller were made by Kerner as governor and that appointments were not made of men of whom Mrs. Everett and Miller disapproved. Kerner's involvement in the allotment of racing dates to Maywood, a competitor of the Everett enterprises, and to Egyptian, a tenant of those enterprises, is established by government witnesses.

In evaluating the contentions of the parties the jury was entitled to consider the facts relating to the CTE, BJC and CHR transactions. These were carried on through the issuance and transfer of corporate stock in the names of nominees, the exchanges of checks which on at least one occasion involved a check to cash, the use of the $300,000 check to establish bank accounts without the endorsement of the depositor, the use of numbered brokerage accounts, the backdating of the note and letter, the fictitious interest payments, and the IRS information return by Kerner showing an interest payment to Mrs. Everett to which she was not entitled. The defense explanations of these activities are not convincing.

Significant evidence places the stamp of bribery on the transactions. When the CTE stock was offered at $1,000 per share, it was worth $2,500 per share. At the time of the transfer of the CTE stock, and its exchange for the BJC stock, the CTE stock was worth $6,000 per share. The BJC stock was sold for $300,000. Isaacs and Kerner ran none of the risks inherent in ordinary business affairs. Their comparatively miniscule cash outlays served as camouflage to conceal the true nature of the complex activities.

The Court of Appeals does not retry the case, weigh the evidence, or determine the credibility of witnesses. *United States* v. *Miles*, 7 Cir., 401 F.2d 65, 67. The

verdict of the jury must be sustained if, taking the view most favorable to the government, substantial evidence and reasonable inferences therefrom support the action of the jury. *Glasser* v. *United States*, 315 U.S. 60, 80, and *United States* v. *Zimmerman*, 7 Cir., 326 F.2d 1, 3. We are convinced that the evidence is more than sufficient to establish beyond a reasonable doubt the offer of a bribe, the acceptance of the offer, the corrupt intent of the offerors, the knowledge by the offerees of that intent, the receipt of valuable property by the offerees, and actions by the offerees favorable to the offerors.

III. *Validity of the Convictions under the Travel Act Counts.*

Isaacs and Kerner were found guilty, as charged in Counts II, III and IV, of violating 18 U.S.C. § 1952, the Travel Act, which prohibits, inter alia, the use of

> any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity * * *.

The government's proof supporting federal jurisdiction on Counts II, III and IV rested on evidence that three checks, drawn by Joseph Knight on his account at the First National Bank of Alton, Illinois, to distribute some of the proceeds of the bribery scheme to Kerner and Isaacs, had cleared through the Federal Reserve Bank in St. Louis, Missouri, after deposit by the recipients in Illinois banks. Specifically, Count II involved a $7,000 check drawn to and received by Isaacs in payment for the sale of CHR stock. Count III concerned a second $7,000 check drawn to Kerner in payment for his CHR shares. Count IV was based on the clearance of a $41,642.48 check to Faith McInturf as repayment for her loan, which had enabled Isaacs and Kerner to obtain CTE stock.

The government maintains that the passage of these three checks, either by truck or by R.E.A. air express, across the Mississippi River into Missouri from Illinois represents sufficient interstate activity to support Isaacs' and Kerner's convictions for violating § 1952. The defendants, on the other hand, contend that § 1952 requires a more substantial showing of use of interstate facilities as a necessary element of the alleged unlawful activity. For reasons which follow, we conclude that the use of interstate facilities here was so minimal, incidental, and fortuitous, and so peripheral to the activities of Isaacs, Kerner and the other participants in this bribery scheme, that it was error to submit Counts II, III and IV to the jury.

The Supreme Court has spoken of the scope of § 1952 primarily in *Rewis* v. *United States*, 401 U.S. 808. In holding that the operators of a Florida gambling establishment could not be prosecuted under § 1952 by reason of the fact that some of their customers travelled there from Georgia, the Court emphasized that Congress in enacting § 1952 intended primarily to strike at organized crime's interstate operations and that there was no desire to

> alter sensitive federal-state relationships, • • • overextend limited federal police resources, • • • [or] produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. 401 U.S. at 812.

The Court concluded that to hold the defendants liable for the crossing of state lines by their customers would unduly extend the federal power to prosecute essentially state crimes. Similarly, were the § 1952 counts here to be upheld, the federal-state balance would be seriously upset. It would be the rare case where investigation of an enterprise in violation of state law would not disclose some incidental and fortuitous use of interstate facilities which might then be used to support a federal prosecution. Nothing in the legislative history supports such a broad reading of the statute. S. Rep. No. 644, 87th Cong., 1st Sess. See also *Erlenbaugh* v. *United States*, 409 U.S.

239, 247 n. 21; *United States* v. *Archer*, 2 Cir., 486 F.2d 670.

When faced with the task of determining the scope of an ambiguous criminal statute such as § 1952, courts have long adhered to the principle that "ambiguity • • • must be resolved in favor of lenity." *United States* v. *Enmons*, 410 U.S. 396, 411. See also *United States* v. *Bass*, 404 U.S. 336, 349-50. Amplifying on this principle, the Court in Bass noted that

> [We] emphasized only last Term in *Rewis* v. *United States, supra*, we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. In Rewis, we declined to accept an expansive interpretation of the Travel Act. 404 U.S. at 349.

Decisions of the Seventh Circuit also lend support to defendants' argument that the interstate activity in this case was inadequate to trigger § 1952. The first of these decisions, *United States* v. *Altobella*, 7 Cir., 442 F.2d 310, involved an extortion scheme in which an individual was photographed in a compromising situation and then threatened with disclosure unless he paid the sum demanded by the defendants. The defendants knew that the victim was from Philadelphia and that in order to pay them, he would have to cash an out-of-state check. After being cleared through Chicago banks, this check was forwarded to Philadelphia by mail. The court held, however, that the defendants had not violated § 1952. Speaking for the court, Judge Stevens began by noting that § 1952 was enacted to curb criminal activities, particularly racketeering, extending beyond the borders of one state and against which local law enforcement efforts would be ineffective. More than minimal interstate travel incidental to the alleged criminal activity was contemplated by Congress before federal intervention would be warranted. S. Rep. No. 644, 87th Cong., 1st Sess.;

United States v. *Zizzo*, 7 Cir., 338 F.2d 572, 580. In light of this, the court held that the convictions of the defendants in Altobella would have to be reversed since

> [t]he use of the mails by the bank through which appellants' victim's check was cleared • • • was purely incidental to appellants' sordid scheme. Their purpose would have been achieved equally well if the victim had borrowed $100 from associates at the hotel or written a check on a local bank. 442 F.2d at 315.

These same considerations apply with equal force to the three checks forming the basis for the § 1952 counts here. They, too, were incidental to the scheme; checks which would have cleared through Chicago, rather than through St. Louis, could just as easily have been utilized. Indeed, the foundation for finding a violation of § 1952 was even stronger in Altobella. The defendants there at least had reason to believe the check would travel interstate. Here, no one involved in the scheme had reason to suppose that checks drawn on the Alton bank would clear through St. Louis.

The government, nevertheless, argues that the present case is distinguishable since the interstate activity here was in furtherance of a far more "serious" offense than the extortion scheme in Altobella. But although bribery involving state officials concededly is a more "serious" crime, the legislative history and § 1952 itself draw no distinctions between serious and insubstantial state offenses. Rather, the test for application of § 1952 is the nature and degree of interstate activity in furtherance of the state crime.

The government also suggests that Altobella may be distinguishable on the ground that the interstate activity in that case was brought about by the actions of the victim and not those of the defendants as in the present case. We disagree. While it is true that the victim in Altobella signed the check that travelled in interstate commerce, he had little choice in the matter; his actions were compelled by the extortionists in furtherance of their scheme. They were as much responsible for the interstate activity in that case as were Isaacs and Kerner here. The determination of whether § 1952 has been violated should hardly

depend on who actually signs or receives a check that crosses state lines in the process of collection.

A month after the decision in Altobella the Seventh Circuit again interpreted § 1952 in *United States* v. *McCormick*, 7 Cir., 442 F.2d 316, wherein the basis for jurisdiction was an advertisement placed by the defendant in a local Indiana newspaper for salesmen to peddle lottery tickets, even though lotteries violated Indiana law. Some 200 to 500 copies of the ad were mailed to the newspaper's out-of-state subscribers. On the basis of these mailings, the defendant was charged with and convicted of violating § 1952. On review, the conviction was reversed.

The court reaffirmed its earlier position in Altobella, that "minimal" and "incidental" use of interstate facilities does not constitute a violation of § 1952.

United States v. *Lee*, 7 Cir., 448 F.2d 604, cert. denied 404 U.S. 858, concerned an appeal from a conviction under § 1952 for running an illegal gambling operation in which two employees regularly crossed state lines from their residences in Kentucky to reach the illegal enterprise in Indiana. The court of appeals upheld the convictions, noting that the record disclosed "continual interstate travel by employees of the illegal venture as well as substantial regular illegal activity 'thereafter' * * *." 448 F.2d at 607. In contrast with Lee, however, here the defendants were responsible for only three checks written in furtherance of the bribery scheme and which happened to be sent across state lines. Like McCormick and Altobella, there was only an "incidental" or "happenstance" use of interstate travel, without which the criminal scheme could just as easily have been accomplished.

Only in the Fourth Circuit do we find any support for the government's position. In *United States* v. *Salsbury*, 4 Cir., 430 F.2d 1045, the court held that the cashing of out-of-state checks with a local druggist by the operator of a Maryland gambling operation supported a conviction under § 1952 since these checks were eventually sent across state lines for clearance by the bank in which the druggist deposited them. Although there is some lan-

guage suggesting a broad interpretation of § 1952, the facts of the case would support a conviction even under the restrictive reading given § 1952 by the Seventh Circuit decisions. The interstate activity in Salsbury was not incidental or a matter of happenstance. The gambling operation catered to a large number of out-of-state customers who were prepared to pay their gambling debts only by check. To assure continued patronage by these gamblers and thereby the successful conduct of the criminal activity it was crucial that these checks be accepted, even though they would eventually travel out-of-state for clearance. Indeed, the sheer number of checks deposited and destined to be sent beyond Maryland's borders enforces the view that the interstate activity in Salsbury was hardly minimal, incidental, or fortuitous, but rather was central to the criminal scheme.

An earlier Fourth Circuit decision cited in Salsbury and relied on by the government here, *United States* v. *Wechsler*, 4 Cir., 392 F.2d 344, cert. denied 392 U.S. 932, involved the deposit of a check in furtherance of a bribery scheme. A divided court concluded that "[w]hen one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce" so that § 1952 comes into play. 392 F.2d at 347 & n. 3. We are unable to agree with this view of § 1952, however, not only because it assumes that the use of a single check crossing state lines may trigger § 1952, but also because it suggests that the check need not actually travel interstate.[1] We cannot agree that the incidental use of a federally regulated banking facility furnishes the jurisdictional element of a § 1952 offense.

This same erroneous and highly prejudicial view was reflected in the judge's charge to the jury and would by itself require a reversal of Isaacs' and Kerner's convictions on the three § 1952 counts. The judge incorrectly stated that

[1] See *United States* v. *DeSapio*, S.D.N.Y., 299 F.Supp. 436, 448-49, aff'd, 2 Cir., 435 F.2d 272. That some interstate travel is actually required by the statute is indicated by § 1952's use of the term "facility in interstate or foreign commerce" rather than "facility of interstate or foreign commerce."

> The act of depositing a check representing the proceeds of an unlawful activity in a bank, that is, a national bank or a member of the Federal Reserve System or a bank insured by the Federal Deposit Insurance Corporation, FDIC, constitutes use of a facility in interstate commerce.

Accordingly, the convictions on Counts II, III and IV must be reversed.

IV. *Validity of the Convictions under the Mail Fraud Counts.*

Isaacs and Kerner were also convicted of mail fraud under Counts VI, VIII, IX and XIII of the indictment, 18 U.S.C. § 1341. Specifically, they were charged with defrauding the State of Illinois and its citizens of the honest and faithful services of Kerner as governor, failing to administer the laws of the state in an impartial manner, obtaining secret profits as a result of the bribery scheme in which they actively participated, and defrauding the racing associations of Illinois of the right to obtain racing dates free from corruption and bribery. On appeal, they challenge their convictions by arguing that they could not have violated the mail fraud statute because the indictment failed to charge that they had defrauded the State of Illinois, its citizens, or the racing associations "out of something of definable value, money or property." Absent a monetary loss, they maintain, the breach of fiduciary duty which occurred here amounts to no more than a constructive fraud and not a violation of § 1341. We do not agree.

The mail fraud statute is not restricted in its application to cases in which the victim has suffered actual monetary or property loss. See, *e.g., United States* v. *Dorfman,* S.D.N.Y., 335 F.Supp. 675, 679, aff'd on other grounds, 2 Cir., 470 F.2d 246; *United States* v. *Faser,* E.D. La., 303 F.Supp. 380, 384; *Bradford* v. *United States,* 5 Cir., 129 F.2d 274, 276, cert. denied 317 U.S. 683.

In a related development, the Supreme Court has made clear that a defendant may be convicted of conspiracy to defraud the United States, 18 U.S.C. § 371, even though the government has not suffered a financial loss. *Haas*

v. *Henkel*, 216 U.S. 462, 479; *United States* v. *Barnow*, 239 U.S. 74, 79. See also *Miller* v. *United States*, 2 Cir., 24 F.2d 353, 359, cert. denied 276 U.S. 638. In *Hammerschmidt* v. *United States*, 265 U.S. 182, 188, the Court noted that:

> It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

In *Shushan* v. *United States*, 5 Cir., 117 F.2d 110, cert. denied 313 U.S. 574, the court recognized that

> No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud. 117 F.2d at 115.

Shushan upheld the mail fraud prosecution of a member of a Louisiana parish levee board for receiving kickbacks from the underwriters of a plan to refund outstanding bonds of the levee district. The defendant argued that no actual fraud had occurred since the refunding operation was actually profitable to the levee board. Nevertheless, the court stressed that

> A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. Id.

As has been shown above, this is precisely what occurred here. The citizens of Illinois were defrauded of Kerner's honest and faithful services as governor.

The Seventh Circuit recently dealt with a somewhat similar fact situation in *United States* v. *George*, 7 Cir., 477 F.2d 508, cert. denied 42 LW 3195 (Oct. 9, 1973). In that case, an employee of Zenith Radio Corporation received kickbacks from a supplier of cabinets to whom he had awarded a Zenith contract. The evidence showed that the cabinet supplier was the only available source

of the item at the time, that the price paid by Zenith was fair and reasonable, and that no other preferential treatment was accorded the supplier in return for the kickbacks. In affirming the convictions, the court stated that

> If there was intent • • • to deprive Zenith of [its employee's] honest and loyal services in the form of his giving [the supplier] preferential treatment, it is simply beside the point that [the employee] may not have had to (or had occasion to) exert special influence in favor of [the supplier] or that Zenith was satisfied with [the supplier's] product and prices. 477 F.2d at 512.

There was evidence here not only that the State of Illinois and its citizens were deprived of the loyal and honest services of their governor, Kerner, but that the defendants actually did exert special influence in favor of and bestowed preferential treatment on Mrs. Everett.

Having concluded that there was a prosecutable scheme to defraud, with active and intentional participation by Isaacs and Kerner, we must then consider whether the jury could find that the mailing alleged in the indictment were in furtherance of the scheme as required by § 1341. We conclude that it could so find.

Count VI was based on an IRS form 1099 interest payment notice mailed by Kerner to Mrs. Everett, on or about February 21, 1967, and a copy of which was sent to the Internal Revenue Service. The government claimed, and the jury could find, that Mrs. Everett had made no loan to Kerner. The "interest" reported on the form was a deceptive method of legitimatizing the backdated note presented to Mrs. Everett in 1966 at the time of Kerner's acquisition of CTE stock in order to make the bribe appear as a 1962 sale and purchase. It is enough that the mailing contributed to the carrying out of the scheme. See *Pereira* v. *United States*, 347 U.S. 1, 8.

Counts VIII and IX charged mailings related to the distribution of proceeds resulting from the bribery scheme. The specific mailing charged in Count VIII was the transmittal, on or about June 1, 1967, of the $7,000

check, drawn by Knight to the order of Kerner and deposited by Kerner in the Antioch Savings and Loan Bank, by that bank to the American National Bank for collection. This $7,000 check from Knight to Kerner represented proceeds from the sale of CHR stock to the Becker brothers in May, 1967. The mailing was in furtherance of the scheme because the success of the venture depended upon receipt of funds laundered by nominees such as Knight, which in turn depended upon the bank collection processes. Distribution of the CHR proceeds through a nominee was one step in the plan to provide Kerner with the cash benefits of the bribery.

Count IX charged that, on or about March 6, 1967, Kerner had mailed a $2,800 check, the sum of CHR dividends received by George Schaller at his nominee, to the First National Bank of Chicago for deposit. Schaller had washed the funds initially by depositing the check from CHR in his personal account and then writing his own check to Kerner for the same amount. As with the $7,000 check from Knight, the receipt and deposit of this payment represented an elaborate laundering method by which the conspiracy to defraud could be concealed and was thus an integral part of the mail fraud scheme.

The mailing charged in Count XIII was the race date acceptance letter sent by the Illinois Racing Board on or about November 27, 1967 to Balmoral Jockey Club president, Harold Anderson. The racing dates awarded in the acceptance letter had been allocated on the basis of a false application submitted by Balmoral Jockey Club, listing in Knight's name the stock beneficially owned by Kerner, in violation of board regulations and state law. The defendants argue that the mailing was not caused by them and therefore does not support their convictions. The mailing of the acceptance letter by the board would not have occurred had William Miller not first sent the application for racing dates, which he knew was false. He obviously sought response to his application from the board. Since there was evidence that Isaacs and Kerner were participants in the scheme, they "may be convicted of the mailing of a letter which one of [their] partners caused to be mailed in the execution of the

scheme." *Chambers* v. *United States*, 8 Cir., 237 Fed. 513, 524; *Baker* v. *United States*, 8 Cir., 115 F.2d 533, 540, cert. denied 312 U.S. 692.

We do not find anything in *United States* v. *Maze*, decided by the Supreme Court on January 8, 1974, which would require reversal on any of these four mail fraud counts. In that case Maze had received the full benefit of each fraudulent use of the stolen credit card before the transmittal of the invoices by mail to the Louisville bank. Thus the Court said that "[r]espondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." 42 LW 4113, 4115.

Here the success of the scheme to defraud so far as all participants, and particularly Kerner and Isaacs, were concerned, depended on the continued concealment of the bribery scheme, and the devious and complicated devices which were used until they finally received the cash benefits of the bribery in March, 1968. It was not until Isaacs and Kerner had each received $150,000 for their BJC stock which they had received in exchange for CTE stock that it can be said that the bribery had come to full fruition, and the payment of $300,000 for the stock by CHR was concealed by a check for that amount to Joseph Knight who held the stock as nominee for Isaacs and Kerner. Knight in turn endorsed the check to Isaacs. Isaacs was able to avoid endorsement by negotiating it through the bank for which he was counsel, and divided the proceeds between Kerner and himself through new accounts which Issacs then opened. Moreover, it was not until April 1968 that Isaacs and Kerner made any disclosure of their gains in their tax returns for the year 1967, which even then were designed to conceal their true nature.

Thus, the mailings, all made in 1967, which form the basis for the four mail fraud counts of which Isaacs and Kerner were convicted, were each made for the purpose of executing the fraudulent scheme or attempting to do so. The Count VI mailing by Kerner of the 1099 form to Mrs. Everett, on or about February 21, 1967, was

integral to the pretense that Mrs. Everett had loaned money to Isaacs and Kerner in 1962.

The Count VIII mailing of the $7,000 Knight check to Kerner by the Antioch Bank, on or about June 1, 1967, was necessary to the acceptance and the concealment of the proceeds of the CHR stock, the smaller part of the bribery.

The Count IX mailing by Kerner, on or about March 6, 1967, of Schaller's $2,800 check to the First National Bank of Chicago, was also necessary to the acceptance and concealment of a dividend from the CHR stock.

The Count XIII mailing by the Racing Board to BJC, on or about November 27, 1967, of the race date acceptance form, was a necessary sequel to the concealment of the beneficial interest Isaacs and Kerner then had in BJC, without which concealment the race dates might not have been given as the application therefor failed to make the disclosures required.

Since there was evidence as to all the elements of a violation of § 1341, including active participation in a scheme to defraud, fraudulent intent, and use of the mails in furtherance of the scheme, see *Pereira* v. *United States, supra,* we affirm the convictions of Isaacs and Kerner on Counts VI, VIII, IX and XIII.

V. *Validity of the Convictions on the Conspiracy Count.*

Count I charges a § 371 conspiracy to violate the Travel Act and the Mail Fraud Act. We have held that the convictions on the substantive Travel Act counts must be reversed and those on the substantive Mail Fraud counts must be sustained. The problem remains as to the validity of the conviction on the conspiracy count.

Conspiracy is an independent offense, perhaps more reprehensible than the substantive crime. *United States* v. *Rabinowich,* 238 U.S. 78, 88. Each count in an indictment must be treated as a separate indictment. *Dunn* v. *United States,* 284 U.S. 390, 393. Acquittal on a substantive count does not bar conviction for conspiracy unless there is an identity of the proof necessary. *United States* v. *Fassoulis,* 2 Cir., 445 F.2d 13, 18, cert. denied 404 U.S.

858; *United States* v. *Carlton*, 5 Cir., 475 F.2d 104; and *Mackett* v. *United States*, 7 Cir., 90 F.2d 462, 465.

Defendants assert that the proof does not show an intent to use interstate facilities in violation of the Travel Act or to use the mails in violation of the Mail Fraud Act. On the substantive Mail Fraud counts we have held that the evidence showed the requisite intent to use the mails. On the Travel Act counts we reverse the convictions because of the minimal use of the interstate facilities and because of an erroneous instruction. Under the Travel Act the use of the interstate facilities furnishes only the jurisdictional base and need not be intentional. The pertinent intent required by the statute relates to the distribution of the proceeds of an unlawful activity. The evidence shows that the distribution of the bribery proceeds was part of the complex, over-all plan of the defendants. Intent to provide the jurisdictional base is not essential to proof of conspiracy to commit the crime. See *United States* v. *Roselli*, 9 Cir., 432 F.2d 879, 892, cert. denied 401 U.S. 924.

The reversal of the substantive Travel Act counts does not require reversal of the conspiracy charge. Cf. *United States* v. *Bates*, 7 Cir., 141 F.2d 436, 437, rev'd on other grounds, 323 U.S. 15, modified 148 F.2d 907; and *Andrews* v. *United States*, 4 Cir., 108 F.2d 511, 515. The evidence sustains the conviction on the conspiracy count.

VI. *Validity of Kerner's Conviction under the Perjury Count.*

Kerner attacks his conviction of perjury under 18 U.S.C. § 1623 on contentions of (1) duplicity of the count (Count XIV), (2) possibility that the jury convicted him for a "literally true" answer to a question posed to him before the grand jury, and (3) unconstitutionality of the statute.

The claim of duplicity rests in part upon a preliminary question which was not included in the questions and answers which the indictment alleged were false. That question was:

As Governor did people come to you and discuss with you or ask you for favors with respect to racing dates and then you refer these people to Mr. Miller or the Racing Commissioner?

Kerner answered in the negative and said:

> • • • [O]nly once did anyone approach me and send a letter, brochure, concerning racing dates. And it had to do with Maywood and the name 'Allen' comes to my mind.

The declarations of Kerner on which the perjury count was predicated are set out in footnote 2. He was questioned

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[2] Q. Do you recall anyone coming to you with respect to the race dates that had been assigned to or were under consideration for Egyptian Trotting?

A. No, as I say, the only recollection I have of anyone coming to me complaining about dates was Allen of Maywood. I never discussed dates with anybody other than Allen to my best recollection.

Q. Do you know the persons in interest in the racing entity known as the Egyptian Trotting Association?

A. No, I don't.

Q. Did you ever say to anyone with respect to Egyptian Trotting dates, "It is difficult to make a decision when two people want the same racing dates?"

A. I could not have made that statement.

Q. I take it—

A. My only recollection of anyone coming to me about race dates was Maywood. I have no recollection of any conversation about racing dates with anybody else. I didn't inject myself in that area at all; at no time.

Q. Well, when you appointed the members to the Harness Racing Commission, was Thomas Bradley the chairman?

A. I think he was the chairman.

Q. He was the chairman?

A. Yes.

Q. Did he come to you on some occasion when you had a discussion with him regarding racing dates at Maywood?

A. No.

Q. Did you discuss with Mr. Bradley the taking of dates away from Maywood and giving them to another entity?

A. I have never had any kind of discussion of that sort with anybody. I tell you now, I told you before, and I tell you again, I never injected myself in the selection of dates at any time.

Q. Well, specifically, did you tell Mr. Bradley that the Harness Racing Commission should take dates away from Maywood and give those dates to Sportsman's Park and to Washington Park?

A. I say again, I never directed anybody to do anything with racing dates, and I can say that unequivocally. I never was involved in it. I never had any discussion of dates. I knew the dates after the Commission had determined them, but I tell you that unequivocally.

Q. How did you learn the dates after the Commission had determined them?

before the grand jury at some length regarding discussions that he allegedly had with James Hayes, Clyde Lee, and Thomas Bradley about racing dates. At the trial both Lee and Bradley testified as to the discussions, but the Hayes incident was withdrawn from jury consideration for lack of evidence, because of Hayes' death.

Kerner contends that the preliminary question, supra, was confusing in that it led him to believe that the subsequent questions pertained only to the question of his having influenced the allotment of racing dates and not the matter of conversations about racing dates, and that the indictment having charged false declarations by him

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[2] (Continued)

A. They are published. Usually I got them the day before they were published. Mr. Miller and a couple of people would come to me and say, "These are the dates." I would say, "Fine. Publish them."

Q. Would you have to okay them for publication?

A. No, this was a courtesy they were doing for me. In other words, I knew the dates possibly 24 hours before the public did, but I never changed a date, I never suggested a change of date at any time, and I can say that unequivocally.

Q. Do you recall James Hayes who was connected with the Racing Commission?

A. The name is familiar.

Q. Did you ever talk to him about racing dates?

A. No.

Q. Do you remember making—

A. Mr. Woerheide, so that we can save your time and mine, I want you to know unequivocally without any reservation whatsoever I never discussed racing dates with anybody at any time with the exception of the complaint filed by Allen, I think, whom I have mentioned. I tell you I never discussed racing dates with anyone.

Q. Judge Kerner, I want to ask you if you made a long distance call to Mr. Hayes at a time when he was out of the State of Illinois and asked him to change certain harness racing dates?

A. I have no recollection of that, none. I don't know why I should. I never involved myself.

Q. Is it your recollection you did not make a long distance call to him and ask him to change harness racing dates?

possible I made a long distance call. That's possible, but as to dates, no.

A. Wait a minute, now, let's divide that question in two parts. It's possible I made a long distance call. That's possible, but as to dates, no. What the conversation may have been, I don't know, but I can assure you right now, and I want the Grand Jury to understand this, I never interjected myself personally in racing dates with anybody at any time except this one instance of complaint that I had from Allen.

Q. That would include a specific request to Mr. Bradley to change dates?

A. Yes, sir.

Q. And that would include a specific request to Mr. Hayes to change dates?

A. Yes. I can't understand what my purpose would be in even suggesting it.

as to both of these matters in a single count was duplicitous. These contentions are without merit.

The grand jury's inquiry was directed at Kerner's involvement in the allocation of racing dates. The questions regarding the conversations by Kerner with Lee and Bradley were subsidiary to their probe of Kerner's involvement in the allocation of racing dates.

A duplicitous count is one which charges more than one distinct and separate offense. *United States* v. *Crummer*, 10 Cir., 151 F.2d 958, 963, cert. denied 327 U.S. 785. A count does not become duplicitous because more than one means may be alleged to have been involved in the commission of the single offense. Id. See also *Driscoll* v. *United States*, 1 Cir., 356 F.2d 324, 331, vacated on other grounds, 390 U.S. 202; *United States* v. *Warner*, 8 Cir., 428 F.2d 730, 735, cert. denied 400 U.S. 930; *Greenbaum* v. *United States*, 9 Cir., 80 F.2d 113, 116. In perjury cases this means that where one offense is committed, all the false declarations pertaining to that offense can be charged in one count without making that count duplicitous. See *Vitallo* v. *United States*, 9 Cir., 425 F.2d 416, 418, cert. denied 400 U.S. 822; *United States* v. *Edmondson*, 5 Cir., 410 F.2d 670, 673, n. 6, cert. denied 396 U.S. 966.

Kerner next contends that the perjury conviction was invalid under *Bronston* v. *United States*, 409 U.S. 352, because of the possibility that it was based on his answer to the following question:

> Q. Did you ever say to anyone with respect to Egyptian Trotting dates, 'It is difficult to make a decision when two people want the same racing dates?'

Kerner's answer was as follows:

> A. I could not have made *that* statement. (Emphasis added.)

It is argued that the variance between the words which Lee, president of Egyptian Trotting Association, testified that Kerner had used in a conversation regarding Egyptian dates, and the language which was used in the question posed to Kerner before the grand jury made Kerner's answer, "I could not have made that statement," literally

true. The language which Lee testified that Kerner had used was that he (Kerner) was "in the middle of the thing and would probably have to make the decision."

It is clear from Kerner's testimony before the grand jury (see n. 2) that he was not attempting to evade or be unresponsive on the questions relating to any involvement by him in the fixing of racing dates. To the contrary, he was at pains to be explicit and emphatic before the grand jury that he had at no time and in no manner ever injected himself into that area, as a repetition of the two following statements demonstrates:

> A. • • • [S]o that we can save your time and mine, I want you to know unequivocally without any reservation whatsoever I never discussed racing dates with anybody at any time with the exception of the complaint filed by Allen, I think, whom I have mentioned. I tell you I never discussed racing dates with anyone.
>
> • • •
>
> A. • • • [B]ut I can assure you right now, and I want the Grand Jury to understand this, I never interjected myself personally in racing dates with anybody at any time except this one instance of complaint that I had from Allen.

As to the contention that § 1623 is unconstitutional in having eliminated the long-prevailing rule that perjury must be proven by two witnesses, such cases as there have been upon the question have all rejected the contention. In *Weiler* v. *United States,* 323 U.S. 606, 608-610, the government had urged the Supreme Court to abandon the rule, but the Court refused to do so, saying:

> Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy • • •.
>
> The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries • • •.
>
> Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule.

> • • • 'The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice.'

The courts that have had occasion to deal with § 1623 have regarded Weiler as implying that the two-witness rule is not one of due process substantiveness and as merely holding that it ought not be abolished in the absence of legislation by Congress. No court has yet upheld the challenge to the constitutionality of § 1623. See *United States* v. *Ruggiera*, 2 Cir., 472 F.2d 599; *United States* v. *McGinnis*, S.D. Tex., 344 F.Supp. 89; *United States* v. *Ceccerelli*, W.D. Pa., 350 F.Supp. 475. Congress has the power to abrogate a long-standing rule of less than constitutional dimensions. See *Dutton* v. *Evans*, 400 U.S. 74, 80-83; *Hawkins* v. *United States*, 358 U.S. 74, 79.

We agree with the holding of the Second Circuit in *Ruggiero, supra*, 472 F.2d 599, at 606:

> It is alleged that the removal by [§ 1623] of the 'two-witness rule' or 'corroboration rule' for perjury cases violates the confrontation clause of the Sixth Amendment. While it is true that the 'two-witness' rule has long prevailed in the federal courts, it is not one of constitutional dimension. • • • Here Congress has specifically provided that '[I]t shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence'. As the rule is not of constitutional dimension, Congress' judgment controls.

We affirm Kerner's conviction on Count XIV.

VII. *Validity of Kerner's Conviction under the False Statement Count.*

Count XV charges Kerner with making false statements to IRS agents in violation of 18 U.S.C. § 1001 which provides that "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up • • • a material fact, or makes any false, fictitious or fraudulent statements or representations" shall be punished by fine or imprisonment.

On July 15, 1970, special agents Stufflebeam and Campbell of the IRS saw Kerner in his chambers, told him that he was under criminal investigation for income tax violations, and gave him the *Miranda* warning. Stufflebeam asked Kerner to identify the "Chicago Co." listed in his 1967 tax return as a stock, the sale of which had produced a long-term capital gain. Kerner said that the reference was to a financial institution, that he had purchased the stock on the advice of his broker, and that a friend of his, Isidore Brown, was a corporate officer. Kerner did not deny making these statements. The evidence established that the stock in Chicago Co. was privately held, that Kerner had never owned any of its stock, and that Isidore Brown had never been involved with that company. Kerner also told the agents that the "Chicago Co." transaction did not refer to Chicago Harness Racing Company and that his only transactions in racing stock involved CTE and BJC. After the conference with the IRS agents, Kerner called on his accountant the next morning and disclosed to him that Chicago Co. was really CHR. The evidence is more than sufficient to establish that the statements were false and were made knowingly and willfully. Kerner contends that oral conversational responses given in an interview with the investigative agents, while not under oath, do not suffice to support a § 1001 charge.

The first problem is whether the statements were made in connection with a matter within the jurisdiction of a federal department or agency. The history of §1001 has been reviewed at great length in many decisions. See e.g. *United States* v. *Gilliland*, 312 U.S. 86; *United States* v. *Beacon Brass Co., Inc.*, 344 U.S. 43; *United States* v. *Bramblett*, 348 U.S. 503; and *United States* v. *Adler*, 2 Cir., 380 F.2d 917, cert. denied 389 U.S. 1006. For our purposes it suffices to note that § 35 of the Criminal Code, the predecessor of § 1001, originally condemned only false claims intended to defraud the United States of property. It was amended in 1934 "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *Gilliland*, 312 U.S. at 93. Hence, proof of pecuniary loss is no longer required. Ibid. *Beacon Brass* recognizes that there is no distinc-

tion between oral and written statements, 344 U.S. at 46. The 1948 revision, which put § 1001 in its present form, 62 Stat. 683, did not make any substantive change. *Bramblett*, 348 U.S. at 508. The statement need not be under oath. *Adler*, 380 F.2d at 922, and cases there cited. In *Bryson* v. *United States*, 396 U.S. 64, 70, the Court said:

> Because there is a valid legislative interest in protecting the integrity of official inquiries • • • we think the term "jurisdiction" should not be given a narrow or technical meaning for purposes of § 1001 • • •. A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under §1001.

Kerner argues that the statute does not apply to statements made to investigating agents. Prime reliance is placed on *Friedman* v. *United States*, 8 Cir., 374 F.2d 363, which involved a false statement to an FBI agent in an effort to initiate an investigation. From its review of the history of § 1001, the court concluded that the statute was intended to facilitate the proper functioning of regulatory agencies. The court pointed out that the FBI was empowered to investigate but not regulate and said that false information did not pervert the investigative function, 374 F.2d at 366 and 369. In *Bryson*, 396 U.S. at 71, n. 10, the Court referred to *Friedman*, and after noting that the FBI "had no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry" said. "We have no occasion in the present context either to approve or disapprove Friedman's holding." In *United States* v. *Adler*, 2 Cir., 380 F.2d 917, 922, the Second Circuit expressly rejected Friedman.

Kerner says that IRS special agents are in the same category as FBI agents because their function is the investigation of criminal violations of the tax laws. Although those agents make criminal investigations, our attention is directed to no statute or regulation which limits them to that area. IRS differs from the FBI in that it has regulatory responsibilities in the administration and enforcement of our self-assessment income tax

system. It promulgates regulations (26 U.S.C. § 7805(a)), appoints personnel "for the administration and enforcement of the internal revenue laws," (§ 7803(a) and §§ 7601 et seq.), and may assess deficiencies, penalties, and interest (§§ 6201 et seq., 6211 et seq., 6601, 6651, 6671, and 6672). These statutes provide a basis for the request by the agents that Kerner furnish them with information regarding his tax return. The jurisdictional requirement of § 1001 is satisfied. See *United States* v. *Ratner,* 9 Cir., 464 F.2d 101, 103; *United States* v. *McCue,* 2 Cir., 301 F.2d 452, 454-456, cert. denied 370 U.S. 939; and *Knowles* v. *United States,* 10 Cir., 224 F.2d 168, 171-172. We recognize the concern which has been expressed with regard to the possible over-extension of § 1001, see National Commission on Reform of Federal Criminal Laws, Working Papers pp. 671-673, but we are convinced that any judicial interpretation excluding statements to IRS agents from the application of § 1001 would be to give the term "jurisdiction" as used therein the "narrow or technical meaning" which *Bryson* forbids. 396 U.S. at 70. Any change in the law must come from Congress.

The remaining problem is whether Kerner willfully and knowingly made a false statement of a material fact. *Paternostro* v. *United States,* 5 Cir., 311 F.2d 298, has no application here. The basis of the § 1001 charge there was a series of "exculpatory no" answers to questions of an IRS agent. Kerner, a lawyer of long experience in public office, did more than deny that "Chicago Co." was CHR. He went on and volunteered the information that "Chicago Co." was a financial institution whose stock had been recommended by a broker and whose officers included a friend of his. These statements were false. He also said untruthfully that his only transactions with race track stocks involved CTE and BJC. Many of the unusual and concealed transactions that went to proof of bribery related to CHR stock. Kerner's statements were positive and affirmative, and were calculated to pervert the authorized functions of government. See *Gilliland,* 312 U.S. at 93. They were material to a determination of whether the CHR transactions produced income from a bribe rather than from a legitimate business transaction. If the proceeds were taxable as ordinary income rather than as a long-

term capital gain, IRS had the statutory responsibility and duty to make deficiency assessments and to determine whether any penalties should be imposed. We are convinced that the evidence establishes material false statements made affirmatively, voluntarily, willfully, and knowingly in a matter over which an agency of the United States had jurisdiction. The government proved all the elements essential to conviction under § 1001.

VIII. *Questions relating to Joinder.*

Kerner contends that the joinder of the perjury count, charging him separately, with the joint counts charging conspiracy, Travel Act, and Mail Fraud violations, was improper. Isaacs complains of the joinder of the counts charging Kerner separately with perjury, violation of § 1001, and false income tax return; he also challenges the joinder of Count XIX charging him separately with a false income tax return.

We have two problems, (1) the joinder of multiple counts against one defendant, and (2) the joinder of multiple defendants. Rule 8(a), F.R.Crim.P., permits the joinder of offenses "if the offenses charged * * * are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 8(b) permits the joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

When multiple defendants are charged in the same as well as multiple counts, a challenge by a single defendant to joinder of offenses in which he is charged is governed by Rule 8(a). Conversely, when one or more defendants challenge joinder and do not restrict their attack to those offenses which pertain solely to them, Rule 8(b) applies. *United States* v. *Sweig,* 2 Cir., 441 F.2d 114, 118-119, cert. denied 403 U.S. 932; and *United States* v. *Roselli,* 9 Cir., 432 F.2d 879, 898, cert. denied 401 U.S. 924.

Rule 8 is construed broadly to allow liberal joinder and thereby enhance the efficiency of the judicial system. *United States* v. *Friedman,* 9 Cir., 445 F.2d 1076, 1082,

cert. denied 404 U.S. 958, and *United States* v. *Roselli,* supra, 432 F.2d 899. The word "transaction" contemplates a series of many acts "depending not so much upon the immediateness of their connection as upon their logical relationship." *Moore* v. *New York Cotton Exchange,* 270 U.S. 593, 610, relied on in both *United States* v. *Friedman,* supra, and *Cataneo* v. *United States,* 4 Cir., 167 F.2d 820, 822-823, in construing Rule 8.

The contention of Kerner presents a Rule 8(a) problem as does also that of Isaacs with regard to Count XIX. The perjury and other offenses with which we are concerned have a logical relationship. They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses. Sweig, *supra,* was a case in which perjury counts were joined with a conspiracy count. There, as here, the commonalty of proof sufficed to establish that the offenses were "connected together" for the purposes of Rule 8(a). 441 F.2d at 118-119. We find no Rule 8(a) violation in connection with any of the challenged counts.

This brings us to the argument of Isaacs which presents a Rule 8(b) problem arising out of the joinder of the perjury, § 1001, and false return counts charging Kerner separately. Multiple defendants may be joined if they have participated in the same series of acts or transactions. The conspiracy, Travel Act, and Mail Fraud counts all bore on the underlying claim of bribery. The evidence to establish the counts in question was pertinent to proof of other counts. The reliance of Issacs on *Krulewitch* v. *United States,* 336 U.S. 440, and *Grunewald* v. *United States,* 353 U.S. 391, is misplaced. Those cases were not concerned with joinder but rather with the admissibility of evidence.

Joinder of separate income tax offenses against individual coconspirators was upheld in *United States* v. *Roselli,* supra, 432 F.2d at 899. There, as here, the underlying crime generated the income tax violations. *United States* v. *Granello,* 2 Cir., 365 F.2d 990, cert. denied 386

U.S. 1019, is not in point because in that case the venture producing the unreported income did not involve common acts of a criminal nature. In sum, the pertinent offenses which Isaacs says were improperly joined were all parts of the same series of acts or transactions, and hence subject to joinder under Rule 8(b).

IX. *Questions Relating to Severance.*

(a) *Joinder of count charging Kerner with false declarations before the grand jury.*

Defendants argue that even if joinder is permissible under Rule 8, a severance should have been granted under Rule 14, F.R.Crim.P. An appropriate joint motion was made before trial and denied. See *United States* v. *Isaacs*, N.D. Ill., 347 F.Supp. 743, 761. Rule 14 provides that if a defendant is prejudiced by a joinder of offenses or defendants, "the court may * * * grant a severance of defendants or provide whatever other relief justice requires." A denial of Rule 14 relief is reviewable only for abuse of discretion or plain error affecting substantial rights. *United States* v. *Echeles*, 7 Cir., 353 F.2d 892, 896-897; and *United States* v. *Sweig*, 2 Cir., 441 F.2d at 119.

Consideration must be given to *United States* v. *Pacente*, 7 Cir., ... F.2d ....., decided December 28, 1973. There a police officer was charged in a two-count indictment with perjury before a grand jury in violation of § 1623 and interference with commerce by threats or violence in violation of 18 U.S.C. § 1951. Departmental regulations made it compulsory for a police officer to testify before a grand jury or suffer suspension or discharge. The court found prejudice because of (1) impeachment of defendant resulting from knowledge by the petit jury that the grand jury determined that defendant had lied, (2) the burden of proof was shifted to defendant who must take the stand to deny the false declaration charge, and (3) the spill-over of evidence from the false declaration count to the substantive count. We have a different situation. Kerner voluntarily appeared before the grand jury. Instead of a two-count indictment charging perjury and the substantive offense, we have a 19-count indictment charg-

ing, among other things, conspiracy, false statements to IRS agents, and false tax returns. We agree with *United States* v. *Sweig,* 441 F.2d at 118-119, that prejudice did not result from the trial of a defendant on both conspiracy and perjury counts. If our conclusions are at odds with *United States* v. *Pacente,* supra, we can only say that we disagree with that decision. The false statement and false tax return counts charge offenses involving deceitful conduct. The desire of Kerner to testify in support of his honesty was no more urgent in defense of the perjury count than it was in connection with these other counts. There was no shifting of the burden of proof. The jury was adequately instructed in this regard.

Rule 14 must be read along with Rule 8 which balances the possibility of prejudice against considerations of economy and efficiency in the use of the judicial process. We have before us a complex conspiracy involving many acts by the defendants and others. In *Pacente* the false declaration count was one-half of the case against him. Here the presence of multiple counts involving numerous offenses minimizes any possible spill-over effect of the testimony relating to false declarations and relegates those declarations to a peripheral role. Kerner initiated the false declaration charge by testifying before the grand jury. He may not take advantage of a situation which he created. The court did not abuse its discretion in denying a severance to Kerner because of the joinder of the perjury count.

So far as Isaacs is concerned, the court instructed the jury that evidence of Kerner's perjury should not be permitted to prejudice Isaacs. In these circumstances there was no abuse of discretion. *United States* v. *Gill,* 7 Cir., ... F.2d ....., decided December 28, 1973; and *United States* v. *Kahn,* 7 Cir., 381 F.2d 824, 837-838, cert. denied 389 U.S. 1015.

(b) *Failure of Isaacs to testify.*

After almost five weeks of trial and after the close of the government's case, Kerner's counsel allegedly became aware for the first time that Isaacs would not take the stand. Counsel then made an oral statement purporting to show that Isaacs' testimony would exculpate Kerner and moved for a severance. The court denied the motion. In this situation, the moving party must show that he will be

unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance of acquittal. *United States* v. *Blue*, 7 Cir., 440 F.2d 300, 302, cert. denied 404 U.S. 836. Kerner's reliance on *United States* v. *Echeles*, 7 Cir., 352 F.2d 892, is misplaced. In that case the codefendant had three times in open court exculpated the defendant. The court held only, Ibid. at 898, that the importance of the codefendant's record exculpatory testimony required a severance. The court comments, Ibid. at 899, that a separate trial would not be time-consuming, but entirely practicable.

In *United States* v. *Johnson*, 7 Cir., 426 F.2d 1112, 1116, cert. denied 400 U.S. 842, the denial of a severance was upheld against the claim that testimony of codefendants would be unavailable unless a separate trial was granted. The court cited with approval, Ibid at 1116, the statement in *United States* v. *Kahn*, 7 Cir., 381 F.2d 824, 841, that "[t]he unsupported possibility that such testimony might be forthcoming does not make the denial of a motion for severance erroneous." In the case at bar, the trial judge, in denying the severance, relied on *Johnson* and said that to grant severance in the circumstances presented would destroy the use of joint trials.

Duplication of an unusually complex trial, such as the one before us which lasted from January 3, 1973, to February 19, 1973, is a factor which a trial court may properly consider when ruling on a severance motion. *United States* v. *Shuford*, 4 Cir., 454 F.2d 772, 777, n. 5. Additionally, there was no representation that Issacs' testimony would be forthcoming in a separate trial. "The court is not required to sever where the possibility of the codefendant's testifying is merely colorable or there is no showing that it is anything more than a gleam of possibility in the defendant's eye." *Byrd* v. *Wainwright*, 5 Cir., 428 F.2d 1017, 1022.

To support his severance claim, Kerner mounts a constitutional challenge based on *Bruton* v. *United States*, 391 U.S. 123, which on confrontation rationale held inadmissible the inculpatory statement of a codefendant. The Court said, however, 391 U.S. at 128, n. 3:

> There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner

is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.

Kerner points out that under the coconspirator exception to the hearsay rule, Mrs. Everett and Miller were permitted to testify to various statements of Isaacs relating to the transactions in issue and implying Kerner's connection therewith. The argument is that because of the inability to call Isaacs as a witness, Kerner was denied the right to refute this testimony.

In *Dutton* v. *Evans*, 400 U.S. 74, 80, the Court said that it could not be argued "that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced." In *United States* v. *Jones*, 7 Cir., 438 F.2d 461, 466, the Seventh Circuit rejected the applicability of *Bruton* to a situation where the statements of a codefendant "fall within the well recognized exception to the hearsay rule that declarations made in connection with a joint venture are admissible against the party who is not present." The community of interest of the conspirators evidences likelihood of reliability. See concurring opinion of Mr. Justice Harlan in *Dutton*, 400 U.S. at 99. Kerner's rights under the Confrontation Clause were not violated. *United States* v. *Cerone*, 7 Cir., 452 F.2d 274, 283, cert. denied 405 U.S. 961.

X. *Miscellaneous, including Questions regarding Admission of Evidence.*

(*a*) *Income tax counts.*

Kerner concedes that Count XVI, charging evasion of tax due for 1966 in violation of 26 U.S.C. § 7201, stands or falls on the sufficiency of proof of bribery. We have held the proof sufficient. The taxable event occurred when Kerner obtained CTE and CHR shares for a fraction of their actual worth. Count XVIII charging Isaacs with tax evasion presents the same situation.

Count XVII against Kerner and Count XIX against Isaacs each charge false statements in tax returns for 1967. These statements included misidentification of CTE, CHR, and BJC, and the claim of long-term capital gains based on a 1962 acquisition date. The record sustains the government claim that the statements were false and were made willfully.

(b) *Examination of Miller on intent of Mrs. Everett in making stock offer.*

Defense counsel objected to the following question put to Miller:

> Q. Mr. Miller, why did you relay Mrs. Everett's offer of stock to Governor Kerner and Mr. Isaacs?

This called for Miller's intent, not the intent of Mrs. Everett. The answer included three considerations: (1) "She was in need of the favor of both Governor Kerner and Mr. Isaacs"; (2) "She was eager to ingratiate herself on a continuing basis with [them]"; and (3) "She certainly wanted to avoid any adverse influence in connection with the racing dates . . . ." These statements were cumulative of Mrs. Everett's testimony and had a solid foundation. In our opinion the objection was properly overruled.

(c) *Examination of members of Illinois Racing Board.*

Several members of the Illinois Racing Board were asked on direct examination by the prosecutor whether they would have granted racing dates to CTE for 1967 and BJC for 1968 if they had known of Kerner's concealed interest in those companies. A typical answer was that of board member Crosby who said that he would not have voted to grant the dates. Later a similar question was asked board member McKellar on direct examination during the defense case, and his answer was that such knowledge would not have influenced his action. This subsequent use of similar evidence minimizes, if not cures, whatever error there might have been in the admission of this bit of prosecution testimony. See 1 Wigmore on Evidence, § 18, p. 345. In any event we believe that in a case such as that at bar the "what if" questions were proper. *Bettman* v. *United States*, 6 Cir., 224 Fed. 819, 830, cert. denied 239 U.S. 642; *United States* v. *Aleli*, 3 Cir., 170 F.2d 18, 20; and *Searfoss* v. *Lehigh Valley R. Co.*, 2 Cir., 76 F.2d 762, 763-764.

(d) *The Modie Spiegel letter.*

Modie Spiegel, who for a time was president of CHR, testified for the prosecution. On direct examination he was shown a letter dated October 3, 1963, written by

him to Mrs. Everett, and intended for presentation to CHR board members. The letter was received for the limited purpose of showing the communication between Spiegel and Mrs. Everett, and was received for that purpose with a cautionary instruction. The letter contained the statement:

> I was informed that it was imperative to have others receive stock in order to get CHR its dates.

Spiegel identified Mrs. Everett as the source of the information. Thus the statement became admissible under the coconspirator's exception and there was no impropriety in the prosecutor's reference thereto during closing argument.

(e) Kerner's contribution to the State Historical Society.

On cross-examination Kerner was asked about a tax deduction which he had claimed because of a contribution to the State Historical Society, a matter not in issue. After objection, the court instructed the jury that the deduction was lawful and that no prejudice should be felt against Kerner because of it. The admissibility of evidence and the extent and scope of cross-examination are matters within the discretion of the trial judge whose rulings will not be disturbed in the absence of abuse of discretion. *Smith* v. *Illinois*, 390 U.S. 129, 132; and *United States* v. *Pate*, 7 Cir., 426 F.2d 1083, 1086, cert. denied 400 U.S. 995. The cautionary instruction of the court rendered the cross-examination harmless. See *Bruton* v. *United States*, 391 U.S. 123, 135, and *United States* v. *Kahn*, 7 Cir., 381 F.2d 824, 838, cert. denied 389 U.S. 1015.

(f) Unfair cross-examination of defense witnesses.

Isaacs argues that the government improperly cross-examined certain witnesses called by Kerner so as to create the illusion that Isaacs had done things to earn the bribe. Negative responses to such questions were emphasized by Isaacs' counsel in closing argument. In the circumstances it is difficult to understand how Isaacs was prejudiced. See *McBride* v. *United States*, 10 Cir., 409 F.2d 1046, 1048. Other contentions go to innuendoes later proven, and to questions which were essentially innocuous. When the few instances complained of by

Isaacs are viewed against the background of the six-week trial and 7,600 page trial transcript, no prejudicial error appears.

XI. The Charge to the Jury.

The instructions of the court cover 140 pages of the record and disclose the diligence, patience, and thoroughness of the trial judge. The shotgun attack of the defendants on the instructions is more confusing than convincing. It is elementary that the instructions must be considered as a whole and it is sufficient if they treat the issues fairly and adequately. Few of the points raised merit discussion.

Isaacs asserts that he was entitled to the text of the court's instructions before closing argument. The court had informed counsel of its action in regard to each requested instruction. This is enough to comply with Rule 30, F.R.Crim.P. See *United States* v. *Shirley*, 7 Cir., 435 F.2d 1076, 1078; *Martin* v. *United States*, 10 Cir., 404 F.2d 640, 643, and like cases. *United States* v. *Bass*, 7 Cir., 425 F.2d 161, is not to the contrary. In that case counsel was misled and could not effectively argue his case. Absent prejudice caused by surprise, a court is not obligated to furnish copies of its instructions before argument. See Wright, Federal Practice and Procedure, § 482, p. 277. In the case at bar there is no convincing showing of either prejudice or surprise, except for the previously mentioned instruction on the substantive Travel Act counts.

The objections of the defendants to the instructions on elements of bribery, specific intent, and good faith do not impress us. When the instructions are taken as a whole, these points are adequately and fairly covered.

The defendants attack the following portion of the instruction on credibility of witnesses:

> If there are conflicts in the statements of different witnesses, it is your duty to reconcile it if you can, for the law presumes that every witness is sworn to [tell the] truth, but if you cannot reconcile them, the law makes you the sole and exclusive judges of the credibility of the witnesses, and the weight to be given their testimony.

The government points out that no objection to this instruction was raised at the trial and, hence, error has

been waived. See *United States* v. *Milstein*, 7 Cir., 401 F.2d 51, 53-54. However, some courts have applied the plain error rule, Rule 52(b), F.R. Crim.P., to similar instructions. See e.g. *United States* v. *Birmingham*, 10 Cir., 447 F.2d 1313, 1315-1316. We consider the issue because of its importance.

In *Cupp* v. *Naughten*, 42 LW 4029, the Court had before it a state habeas corpus case in which the instructions said, "Every witness is presumed to speak the truth." In *Cupp* the Court found that the instructions on reasonable doubt, burden of proof, and presumption of innocence were adequate, and held that in such circumstances the mentioned language did not shift or negate established constitutional guarantees. Our case differs from *Cupp* because here the statement was that every witness "is sworn to [tell the] truth," not presumed to tell the truth as in *Cupp*. Also, in the instant case an affirmative defense was presented by the defense through many witnesses. Accordingly, whatever benefit the instruction afforded went to both the prosecution and defense.

The challenged instruction must "• • • not be judged in artificial isolation, but must be viewed in the context of the overall charge." 42 LW at 4030. In our opinion the attacked instruction does not constitute a denial of due process, a conflict with the defendants' presumption of innocence, a shift of the burden of proof, or an invasion of the jury's province to determine the credibility of witnesses. It did not invade any constitutional right.

Isaacs complains that the "accomplice witness" instruction was faulty in that it presented conflicting standards. We do not so read the instruction. It first defines accomplice accurately and then says:

> The testimony of an accomplice is admissible and entitled to such weight as the jury feels it should have.
>
> In weighing the evidence of an accomplice, you should give due regard to the fact that he might have been on trial as a defendant himself. You should weigh his testimony carefully and cautiously.

This is not a case like *United States* v. *Donnelly*, 7 Cir., 179 F.2d 227, 232-233, where the court inconsistently told the jury, first, that accomplice testimony is to be judged by the same rules as apply to other testimony and, second,

that accomplice testimony must be regarded with due care. In the case at bar, the court defined the duty of the jury and then stated the test which it was to apply. *United States* v. *Balodimas*, 7 Cir., 177 F.2d 485, 487, is likewise not applicable. There the court said that the government witnesses were accomplices who had admittedly broken the law. That instruction presupposed the commission of a crime. The instruction before us has no like infirmity. The Seventh Circuit has uniformly upheld "accomplice witness" instructions when, as here, they point out what an accomplice is and the test to be applied to his testimony. *United States* v. *Battaglia*, 7 Cir., 394 F.2d 304, 313-314, cert. denied 401 U.S. 924; see also *United States* v. *Pritchard*, 7 Cir., 458 F.2d 1036, 1040, cert. denied. 407 U.S. 911; and *United States* v. *Fellabaum*, 7 Cir., 408 F.2d 220, 227, cert. denied 396 U.S. 818.

The prolix instructions requested by defendants merit no mention. It suffices to say that they suffer from imprecision and over-statement and that insofar as they were appropriate the trial court incorporated them into its charge.

Except as noted above in our discussion of the Travel Act counts, we find no error in the charge of the court.

XII. Summations of Government Counsel.

The case was vigorously and aggressively argued by both sides. The closing argument of a prosecutor need not be "confined to such detached exposition as would be appropriate in a lecture," *United States* v. *Wexler*, 2 Cir., 79 F.2d 526, 530, cert. denied 297 U.S. 703, because "[t]o shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." *Di Carlo* v. *United States*, 2 Cir., 6 F.2d 364, 368, cert. denied 268 U.S. 706. The controlling standard is found in *Berger* v. *United States*, 295 U.S. 78, 88, which says that a United States Attorney "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." An advocate is "permitted considerable latitude in replying to his opponent's arguments." *United States* v. *Lawler*, 7 Cir., 413 F.2d 622, 628, cert. denied 396 U.S. 1046; *United States* v. *Hoffa*, 6 Cir., 349 F.2d 20, 51, aff'd 385 U.S. 293; and see *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15. With these principles in mind,

we examine the particular attacks made by the defendants.

The first point relates to the United States Attorney's defense of his integrity. Counsel for Kerner referred to the "vigorous imagination of an ambitious prosecutor," and Isaacs' lawyer said that there was an overwhelming desire to get Otto Kerner and asked the rhetorical question whether the only way to do it was to trample over Isaacs. Kerner's counsel compared the prosecution's technique to that of Adolph Hitler. References were made to the desperation of the prosecution and efforts of the prosecution to persuade witnesses to change their testimony. The comments of the prosecutor in reply fall well within the invited response doctrine.

After referring to the immunity agreement given to Miller by the prosecution, the United States Attorney said:

> Those were the terms. In return for his truthful testimony, the charges against William Miller in this case would be dismissed.

Isaacs contends that this amounts to an improper statement by the prosecutor of his opinion that Miller was a truthful witness. The statement does not vouch for Miller's credibility. There is no insinuation that the comment of the prosecutor was based on anything de hors the record. See *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15. The argument of Isaacs that the prosecutor's reference to the immunity agreement improperly insinuated that the government possessed evidence outside of the record is fanciful. The agreement was before the jury for such consideration as anyone might wish to give it.

Arguments of defense counsel insinuated that the United States Attorney, as an individual, had the power to indict, and had misused that power. In reply the prosecutor said:

> A Grand Jury of 23 citizens in this District determined that there was sufficient evidence to bring this case to trial. I have no power to indict. I just put my name on it. Without a vote of the Grand Jury, this case can't be here. That much is obvious.

The statement of the prosecutor was an invited response and if anything was wrong with it the instructions of the court on the function of an indictment were both elaborate and adequate.

In closing argument Isaacs' counsel made the following explanation of Isaacs' failure to endorse the check representing the sale of the BJC stock:

> Why didn't Isaacs want to present it? I think the answer is simple. It wasn't all his money. It was only half his money. Why endorse the check when it is not all going to go to him?

In reply, the prosecutor said:

> Mr. Wolfson tells you this morning that the reason why Isaacs didn't want to endorse that check was because all the money wasn't his. We have waited now six weeks for the explanation of why Isaacs didn't want to endorse that check. Finally, Mr. Wolfson gives it to us, and that's the reason.

The attempt of his counsel to explain Isaacs' mental processes invited the government to respond to the weakness of the argument. It was not an invitation to the jury to hold Isaacs' failure to testify against him.

Perlmutter, an accountant for Isaacs, testified as a government witness and said that the false designation of CHR as Chicago Co., in Isaacs' 1967 return, was an inadvertent typing error. This testimony was at odds with that of Kerner's accountant who said that the designation of Chicago Co. for CHR was in accordance with information furnished by Kerner. Defense counsel argued that the government should have called as a witness Perlmutter's partner, Joseph Golman. The prosecution responded thus:

> After hearing that from one of his accountants, do you think we would put another of his accountants on the stand? Well, if they want testimony like that, they will have to call them. We are not going to call them.

Counsel for Isaacs had stressed Perlmutter's testimony as a defense to the false tax return count. In spite of their reliance on Perlmutter's testimony, counsel would deny the right of the government to comment thereon. If the "voucher rule" has any remaining vitality, see *Chambers* v. *Mississippi*, 410 U.S. 284, 296; and proposed Federal Rules of Evidence, Rule 607, this is no place for its application. Defense counsel baited government counsel into the reply.

The prosecution introduced certain declarations made by Isaacs to investigators and the grand jury as false exculpatory statements. Under the completeness doctrine, Isaacs' counsel was permitted to offer the statements in their virtual entirety. In closing argument the prosecuor referred to those statements as lies. The argument complained of can only be viewed as a comment on the falsity of Isaacs' pretrial statements. Those statements were in evidence and subject to comment just as any other bit of evidence. See *United States* v. *Chaney*, 3 Cir., 446 F.2d 571, 575-576, cert. denied 404 U.S. 993.

Kerner argues that the closing arguments of government counsel unduly and prejudicially emphasized the perjury count. A prosecutor may comment on the credibility of a defendant who takes the witness stand. *United States* v. *Jansen*, 7 Cir., 475 F.2d 312, 317, cert. denied 42 LW 3195 (Oct. 9, 1973); see also *United States* v. *Deloney*, 7 Cir., 389 F.2d 324, 326, cert. denied 391 U.S. 904. We have upheld the perjury count and the sufficiency of the evidence to sustain a conviction of that charge. Thus, we do not have a situation of government counsel stressing an invalid count in his argument. The arguments of defense counsel invited the responses made by the prosecutors.

In our opinion the arguments of the prosecutors, taken as a whole or in piecemeal, were well within permissible standards.

We are not unmindful of other contentions made by the defendants. We have not discussed them because either they have been sufficiently covered by what we have already said or they are so clearly without substance as to make a review of them unnecessary.

In summary, we affirm the convictions of Isaacs and Kerner on Counts I, VI, VIII, IX and XIII, the conviction of Kerner on Counts XIV, XV, XVI and XVII, and the conviction of Isaacs on Counts XVIII and XIX. We reverse the convictions of Isaacs and Kerner on Counts II, III and IV.

This per curiam opinion represents the views of the members of the panel, except as specially noted in Judge Johnsen's separate concurring and dissenting opinion.

JOHNSEN, *Senior Circuit Judge, concurring in part, dissenting in part.*

I am in agreement with most of the holdings and statements of the per curiam but differ with a few of them.

I agree that the district court was possessed of subject-matter jurisdiction of the charges against Kerner, but to me this power was derived from Article III, Section 1, of the Constitution and from 18 U.S.C. § 3231 of the Criminal Code.

Under the constitutional provision, the judicial power of the United States has been vested "in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." In creating the district courts, Congress manifestly had the right under the constitutional provision to confer such nature and extent of subject-matter jurisdiction upon them as it chose. Under 18 U.S.C. § 3231, it chose to give the district courts "original jurisdiction * * * of all offenses against the laws of the United States."

If the ambiguous provision of Article I, Section 3, Clause 7 of the Constitution was intended to mean that any officer of the United States, who was subject to having impeachment proceedings brought against him, could not be made to stand trial on criminal charges until after he had been convicted in impeachment proceedings, this in my opinion would at most provide a personal privilege or immunity to him which he was at liberty to assert or not to assert, as he chose. Kerner must be held to have chosen not to attempt to assert any such privilege or immunity, for he never raised the question in any form before the trial court—neither by attempt to have the indictment dismissed, nor by motion to have the trial proceeding stayed.

This is as far, in my opinion, as it is in any event necessary to go to sustain the district court's jurisdiction to try Kerner. Whatever determination may ultimately be necessary to be made of the impeachment and criminal offense question, it does not seem to me that it is necessary or wise to undertake to make that determination in the present situation. The question has been the subject of

bitter agitation and heated dispute on both sides, and the majority's holding can open the door to consequences which it may be better for the nation not to have to experience in the turbulence of the present times. I would hold that, on Kerner's submission of himself to trial, there is no need to decide the specific question.

I am unable to agree with the majority's affirmance of Kerner's conviction of mail fraud under Counts VIII and IX, as to which the mailings occurred after August, 1966. Kerner had by that time become the full beneficial owner of the race track stock involved in the bribery. Mrs. Everett no longer had any right of control over it. Kerner had the right to continue to hold the stock, whose value had been increasing, or to sell it. He chose to sell it, for reasons which are not difficult to infer. What Mrs. Everett had done in bribery was to obligate herself to sell and later to make actual sale of the race track stock to Kerner at a price greatly below its market value, in expected favorable treatment of her racing interests. When the sale was completed, the stock became the subject of ownership in Kerner, and the bribery offense had reached fruition. The incidents after the use of the mails which occurred in relation to Kerner's disposition of the stock or his obtaining the money therefor, did not go to the completion of the bribery, as between Mrs. Everett and Kerner. *United States* v. *Maze*, decided by the Supreme Court on January 8, 1974, seems to me to require reversal as to these two counts.

As to *United States* v. *Pacente*, 7 Cir., ... F.2d ....., decided December 28, 1973, discussed in Section IX of the per curiam, that decision, if followed, would, in my judgment, require reversal of all of Kerner's convictions, for failure of the trial court to grant severance. The panel is in agreement that the holding in the case is bad law and that we cannot conscientiously follow it.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MAR 28 1974

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	Nos. 73-1409 and 73-1410
	)	
THEODORE J. ISAACS and OTTO KERNER, JR.,	)	
	)	
Defendants-Appellants.	)	

Before JOHNSEN, LUMBARD and BREITENSTEIN, Senior Circuit Judges.*

1. The petition for rehearing of defendant-appellant Theodore J. Isaacs is denied.

2. The petition for rehearing of defendant-appellant Otto Kerner, Jr., is denied.

Harvey M. Johnsen, Senior Circuit Judge of the Eighth Circuit, sitting by designation.

J. Edward Lumbard, Senior Circuit Judge of the Second Circuit, sitting by designation.

Jean S. Breitenstein, Senior Circuit Judge of the Tenth Circuit, sitting by designation.

*Of the Eighth, Second and Tenth Circuits respectively, all sitting by designation.

Senior Circuit Judge Johnsen dissents.

PER CURIAM:

Judge Lumbard and Judge Breitenstein are of the view that there is no good reason to delay action on the motions for rehearing, and that there is every reason why the questions raised in this case should be settled without further delay.

On three occasions the active circuit judges of the Seventh Circuit, other than Otto Kerner, have recused themselves from any participation in this case. It seems to us that this has left to the court specially designated the task of deciding any issues raised on appeal; this includes the proper and appropriate application of any rule of law.

Initially, after the filing of a petition for writ of mandamus by the petitioner Kerner on August 4, 1972, all the then active judges of the Seventh Circuit, other than Kerner, recused themselves. This action was communicated to the Chief Justice by Chief Judge Swygert in a letter dated August 9, 1972. Thereafter the Chief Justice, by telegram dated September 19, designated the three judges of this panel to hear and determine all matters arising from the prosecution of the indictment against the defendants.

The trial of Isaacs and Kerner commenced on January 3, 1973. During that trial, two of the active circuit judges of the Seventh Circuit, Chief Judge Swygert and Judge Kiley, testified as character witnesses on behalf of Kerner. After the defendants were convicted on February 19, 1973, and after Kerner filed a notice of appeal on April 26, 1973, all the active circuit judges again recused themselves. Chief Judge Swygert notified the Chief Justice by letter dated April 26, 1973 that it was "the view of the active circuit judges of this court that they should not act upon these appeals." Accordingly, Chief Judge Swygert requested the designation of three judges from outside the Seventh Circuit. As the Chief Justice had already designated the members of this panel, we continued to act pursuant to the designation of September 19, 1972.

We heard argument of the appeals on October 23 and 24, 1973 and reserved decision. In their briefs filed September 4, 1973, and on oral argument, Isaacs and Kerner urged that it was improper to try the perjury charge against Kerner with the other counts of the indictment, and that it was error to deny severance of the perjury count.

While the panel was considering this appeal, argument was heard on December 5, 1973, in United States v Pacente, before a panel consisting of Chief Judge Swygert, Circuit

Judge Sprecher and District Judge Poos. On December 28, 1973, that panel filed its opinion, written by Chief Judge Swygert, which reversed Pacente's conviction. That opinion purported to establish the principle that a defendant could not be tried on substantive counts and a count charging perjury relating to the substantive charges, at the same trial. Counsel for the appellants immediately called our attention to the Pacente opinion and we gave it such attention as we thought it deserved in our opinion filed February 19, 1974 which affirmed the convictions on all but three counts.

Judge Johnsen wrote, regarding the Pacente case, in his separate concurring and dissenting opinion: "The panel is in agreement that the holding in the case is bad law and that we cannot conscientiously follow it."

Meanwhile, the United States had filed a petition for rehearing and rehearing en banc in United States v Pacente, and on February 19, 1974 the active circuit judges of the Seventh Circuit granted rehearing en banc.

Thereafter on March 5, 1974, the appellants filed their petitions for rehearing and rehearing en banc. On the same day the clerk entered an order made by six active circuit judges of the Seventh Circuit, listed as Chief Judge Swygert and Circuit Judges Fairchild, Cummings, Pell, Stevens, and Sprecher, reading:

> Both defendants-appellants in these appeals have filed a suggestion for a rehearing en banc. Each of the judges in regular active service has disqualified himself from consideration of the suggestions for rehearing en banc.

Thus, for a third time, the active circuit judges of the Seventh Circuit, excepting Kerner, have disqualified themselves.

Isaacs and Kerner have now requested that we delay our disposition of their petitions until after the en banc rehearing of Pacente which is scheduled for April 10, 1974. We see no need to do so. This panel is under no obligation to follow any opinions of the Seventh Circuit, whether by a panel or by the court en banc, filed in any cases or matters subsequent to its constitution by the Chief Justice on September 19, 1972. Consequently, having already given lengthy and thorough consideration to all the points raised on the appeal, and on the petitions for rehearing, the petitions for rehearing are denied.

In the event either appellant wishes to file a petition for certiorari within the time allowed, the issuance of the mandate will be stayed subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

The petitions for rehearing are severally denied.

Johnsen, Senior Circuit Judge, dissenting.

I had hoped that ruling on the petitions for rehearing would have been deferred until after the Court of Appeals for the Seventh Circuit had rendered its decision in the in banc hearing which it has granted of the case of United States v. Pacente, No. 72-1988. Argument in the in banc hearing has been set for April 10, 1974.

In the Pacente case, a panel of the Court (two circuit judges and a district judge) had held, in a decision rendered on December 28, 1973, that failure of the trial court to grant severance as to an indictment count for perjury, committed before the grand jury by which the indictment was returned, and a count for another substantive offense, was so inherently prejudicial, even though a limiting instruction had been given, as to require reversal of both of the convictions which had occurred. That holding, if it had been followed by us in the Kerner case, would have required a reversal of his convictions.

We regarded the Pacente decision as being so unsound that we had the right to disagree with it and could properly refuse to follow it, since it represented the holding of only a single panel. Such differences in holdings between co-equal panels of Courts of Appeals have at times occurred, sometimes inadvertently,

and sometimes as a matter of conscientious and firm disagreement.

Usually such a situation is capable of being dealt with by the court taking over the subsequent case for in banc hearing and so establishing the law of the circuit as between the conflicting views of the two panels. No such in banc taking-over of the Kerner case is, however, possible, because of the disqualification which the regular judges of the Court of Appeals have made of themselves as to the case. But the hearing in banc which the Court has granted in the Pacente case will equally be able to establish the law generally of the circuit on the question, and hence necessarily of the Kerner case.

Sitting as a panel of the Court of Appeals for the Seventh Circuit, though from outside the circuit, I do not believe that we could, in judicial responsibility and propriety, refuse to give application in the Kerner case to an in banc holding of the Court, even though we might disagree with it, which would be the situation if the result in the Pacente case should be an in banc adoption of the views of the panel by which the original decision was rendered. In these circumstances, I think we could indicate our disagreement, but we would have to make reversal of the Kerner case and leave to the Supreme Court the question of

settling the law which should be applied as a matter of criminal jurisprudence.

It is for these reasons that I feel we ought to defer ruling on the petitions for rehearing. Taking action now could complicate the whole situation, and a refusal to wait might perhaps also put the judicial process into an unfavorable light. Moreover, if the in banc decision in Pacente should be contrary to the holding of the original panel, the problem of our own panel would be solved.

MEMORANDUM OPINION OF MAY 30, 1972
(347 F. Supp. 743)

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William A. Barnett, Chicago, Ill., for defendant Miller.

Edward Bennett Williams, Williams, Connolly & Califano, Washington, D.C., for defendant Kerner.

George F. Callaghan, Chicago, Ill., for defendant Knight.

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MEMORANDUM

ROBERT L. TAYLOR, District Judge.

Defendants have filed a combined total of forty-three motions (exclusive of alternative motions and motions filed after the deadline agreed to by counsel in January), supported by the same number of briefs. The Government has responded and defendants have filed rebuttal briefs. The reading of the motions and briefs alone involved considerable time and effort. Some of the motions raise difficult questions about which the courts have expressed divergent views.

Motions of Judge Kerner

Motions filed by Otto Kerner, Jr. will be considered in numerical order first, as they were the first to be filed. There are thirteen in number.

Unauthorized Persons in Grand Jury Room

[1] The first is a motion to dismiss the indictment because of the presence of unauthorized persons in the grand jury room during its sessions. This motion is

supported by affidavit and is based on an alleged violation of Rule 6(d), F.R.Cr.P., which provides:

> "Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

The attached affidavit of Kerner states in substance, that he testified on August 6, 1971 before the May, 1971 grand jury which returned the indictment; that during his testimony on that day he saw in the grand jury room the grand jurors, the reporter, the Government lawyers and three other men not shown by the transcript to have been present; that he recognized one of the three men as Internal Revenue Agent T. R. Johnson, with whom he had spent several days in June, 1965, in the course of an audit of certain of this income tax returns; and, that he did not know the identity of the other two men.

An old case dealing with the subject is United States v. Edgerton, 80 F. 374 (D.C. Mont., 1897). In that case, an expert witness was not only permitted to remain after he had testified before the grand jury, but was also permitted to propound questions to subsequent witnesses. The Government argued that the defendant was not prejudiced by these actions. The Court rejected this contention and stated that the common law rule excluding all but the witness and the United States Attorney from the grand jury sessions admitted no exceptions.[1] Potentials

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[1]The Court ignored a statute in force that required the defendant to show prejudice under certain circumstances. R.S. 1025 (1872).

for prejudice were listed that could occur by the presence of an expert witness. The Court concluded that if the presence of an unauthorized person is excused, it will be impossible to set the bounds to prevent abuse. This statement comes as close as possible to a *per se* rule requiring dismissal.

Latham v. United States, 226 F. 420 (C.A. 5, 1915) is another case often cited in support of a *per se* rule regarding dismissal because of the presence of an unauthorized person in the grand jury room while the grand jury is deliberating. In that case, a stenographer, who was also a clerk for the United States Attorney's Office, was allowed to be present and to record testimony. The stenographer had taken an oath to keep secret the grand jury proceedings. The Court, nevertheless dismissed the indictment. Addressing itself to the question of whether the defendant was required to show prejudice, the Court stated that the unauthorized presence was a matter of substance[2] and the presence if unauthorized was illegal.[3]

The foregoing cases were largely conclusory in their reasoning. United States v. Carper, 116 F.Supp. 817 (D.C. D.C., 1953), is better reasoned and supports a *per se* rule. There three deputy marshals were permitted to remain in the room while the prisoners they were guarding testified. The Government argued that the deputies' presence

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[2]See R.S. 1025 (1913). This statute was basically the same as the one disregarded by the *Edgerton* court. This court distinguished it by stating it was concerned with procedural irregularities but that an unauthorized presence was substantive.

[3]Cases disagreeing with this case do so as to presence of a stenographer and do not argue against the basic holding. See Wilson v. United States, 229 F. 344 (C.A. 2, 1916); United States v. Rockefeller, 221 F. 462 (S.D. N.Y., 1914); Wilkes v. United States, 291 F. 988 (C.A. 6, 1923).

was both necessary for protection and in no way prejudiced the defendant. The Court said that at most the defendant need only show "probable prejudice" by the deputies' presence. This prejudice was supplied by a finding that the capacity of the deputies as the witnesses' keepers could well have influenced their testimony. It was pointed out that Rule 6(e) could possibly allow the deputies to divulge what they had heard since that section stated secrecy could not be imposed on anyone other than those listed. Finally, the Court noted the virtual impossibility of an accused ever showing prejudice. This statement severely limited the remarks about showing "probable prejudice." Probable prejudice in this case was supplied and the case was dismissed.

[2] Certain law review articles have suggested that the purpose of the rule is to maintain secrecy.[4] *Wigmore* argues that the rule is not for the accused but for society, witnesses and jurors. Wigmore on Evidence, Vol. VIII, §§2360-63, pp. 728-41 (1961). Secrecy is undoubtedly a purpose behind the rule but the rule is based on a broader ground and that is the possibility of undue influence. In *Latham*, supra, the stenographer had taken an oath of secrecy and there was no allegation that it had been broken. Nevertheless, the Court dismissed the indictment. In *Carper*, supra, the Court pointed out that the prejudice would be the coercive atmosphere generated by the deputies' presence.

Two recent cases reinforce the undue influence factor as the basis for the rule. The first is that of United States v. Borys, 169 F.Supp. 366 (D.C. Alaska, 1959). In that case, the mother was permitted to remain in the grand jury room while her seven-year-old child was testifying. The Court held that this invalidated the indictment. The

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[4]24 Temple L.Q. 342 (1951); 16 Ford L. Rev. 131 (1947).

other case is that of United States v. Bowdach, 324 F.Supp. 123 (S.D.Fla., 1971), in which an FBI agent was in the grand jury room to operate a machine playing tapes for the purpose of refreshing a witness' recollection. In that case the Court said:

"Rule 6(d) and the cases construing it lay down a hard and fast rule which allows for no exceptions."

p. 124

We conclude that an evidentiary hearing is necessary to determine if unauthorized persons were in the grand jury room during its sessions. United States v. Brumfield, 85 F.Supp. 696, 706 (W. D. La. 1949).

Mail Cover

Judge Kerner also moves pursuant to Rule 12(b), F.R.Cr.P., for an order dismissing the indictment upon the ground that the Government unconstitutionally subjected him to a mail cover in violation of Article III of and the First and Fourth Amendments to the United States Constitution, or in the alternative for an order requiring the Government fully to disclose all the facts and circumstances surrounding the aforesaid mail cover and any other mail cover imposed on the defendant and any direct or indirect use made of the fruits thereof, and for an evidentiary hearing thereon for the suppression of all of said fruits. The motion is supported by affidavit of Charles Rhyne, a mail carrier, who stated in substance that sometime about the middle of January, 1971, he received a telephone call from his supervisor, Mr. Erwood, that he would be receiving Form 2007 and that he should list on this form all mail received in Judge Kerner's chambers, including the name, address, city and state of the senders; that sometime previous to January, 1971,

the date he did not recall, he was ordered to fill out the same forms on mail received by Judge Kerner's Chambers in the Dirksen Building.

[3] Defendant's alternative motion for an order requiring the Government to disclose all facts surrounding the mail cover and any other mail cover imposed on the defendant, and any direct or indirect use thereof, is sustained.

The Government is directed to state for the use of the defendant the following: (1) the full extent and duration of the mail covers; (2) the circumstances under which it was instituted, including the names and positions of all persons who authorized it; (3) the procedure by which it was instituted including the names and positions of all persons involved therein; (4) the purported justification for its institution; (5) the information it produced; (6) the names and positions of all persons to whom such information was transmitted and the date of such transmission; (7) the use made of such information.

[4, 5] Many of the courts that have dealt with the mail cover question have held that the Fourth Amendment does not prevent postal inspectors from copying information contained on the outside of sealed envelopes in the mail where no substantial delay in delivery is involved. Lustiger v. United States, 386 F.2d 132, 139 (C.A. 9, 1967); United States v. Costello, 255 F.2d 876, 881 (C.A. 2, 1958); United States v. Schwartz, 283 F.2d 107 (C.A. 3, 1960); Canaday v. United States, 354 F.2d 849 (C.A. 8, 1966); Cohen v. United States, 378 F.2d 751, 760 (C.A. 9, 1967). We have examined the case of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) relied upon by the defendant and do not find anything in that decision which holds mail cover operations are unconstitutional. See Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

[6] We are not impressed with the Government's position that Judge Kerner is not in a position to question the mail cover operations on constitutional grounds until he received the mail from the sender. See Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

[7] Although this Court neither approves nor condones the mail cover of Judge Kerner's chambers as a federal appellate judge, this will not justify the extreme action of dismissing the indictment for alleged violation of his rights under Article III and the First and Fourth Amendments to the Constitution, as argued by his attorneys.

Destruction of Essential Evidence

Defendant Kerner moves to dismiss Count XV on the ground that the Government destroyed essenetial evidence. The Government in reply states that on July 15, 1970, Special Agents Stufflebeam and Campbell interviewed the defendant. During the interview, both of them took notes for the purpose of later incorporating them into a memorandum of interview. Later on the same date, the agents dictated their rough notes and their recollection of what defendant Kerner told them to the IRS secretary. Based upon the agents' dictation, the secretary typed a memorandum of interview. On the evening of July 15, 1970, the agents compared their notes with the formal memorandum of interview and determined that the formal memorandum accurately and fully reflected their rough notes. On, or shortly after July 15, in accordance with the established practice, the rough interview notes were destroyed. See affidavits of Stufflebeam and Campbell, Exhibits A and B to the Government's response.

The case of Killian v. United States, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961), also cited on the question of whether the notes were destroyed due to ordinary or gross negligence or for the purpose of preventing them from being used as evidence. The Court observed that if the notes of Ondrejka of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by Ondrejka and if after having served that purpose they were destroyed by the agents in good faith and in accordance with their normal practice, it will be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive defendant of any right. On the other hand, if they were destroyed for the purpose of depriving the accused of evidence, or in bad faith, such would constitute impermissible destruction.

Defendant relies upon United States v. Bryant, 142 U.S.App.D.C. 132, 439 F. 2d 642 (1971), to support his motion to dismiss the income tax count of the indictment because of the destruction of the agents' notes. In that case, the Court held that where Government agents made a tape recording of motel room conversations between defendant and an undercover agent concerning sale of narcotics, and the Government claimed it lost the recording, the case should be remanded to determine the degree of negligence or bad faith involved on part of the Government and the importance of the evidence lost.

Another case is that of United States v. Heath, 147 F.Supp. 877 (D.C.Hawaii 1957), appeal dismissed 260 F.2d 623 (C.A. 9, 1958). In that case, defendant was charged with evading his income taxes for the years 1949 and 1950 in violation of 26 U.S.C. § 145(b). His books and records were turned over to the agents of the Government in 1952. The trial court found that the records of

the defendant turned over to the Government for at least a part of the period covered by the indictment were corrected by defendant in his handwriting and initialed and that those records were in existence prior to the time the Government agents received certain records from the accused and that those records were in the hands of the Internal Revenue agent during the period they were investigating the civil and criminal tax liability of the accused for the period 1949 and 1950. The Court held that it would be a denial of a constitutional trial to compel the defendant to go to trial in the absence of the records.

[8] In the instant case, the notes were made for the purpose of preparing a formal memorandum. The memorandum has been furnished to the defendant. It is not uncommon for Government agents to destroy their rough notes. See *Killian*, supra; United States v. Hoffa, 349 F.2d 20 (C.A. 6, 1965), aff'd 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

Accordingly, the Court must hear proof before a final ruling can be made on this question.

Statement of Offense under Travel Act

Motion is made to dismiss Counts I through V for failure to charge an offense against the United States under Title 18 U.S.C. § 1952, or in the alternative to dismiss Counts II through V for duplicity.

In considering the motion to dismiss for failure to state an offense, it is appropriate to recall the language of the United States Supreme Court in Hagner v. United States, 285 U.S. 427, 431, 52 S.Ct. 417, 419, 76 L.Ed. 861 (1932):

> "The rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the gener-

al principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' Cochran and Sayre v. United States, 157 U.S. 286, 290, 15 S.Ct. 628, 630, 39 L.Ed. 704; Rosen v. United States, 161 U.S. 29, 34, 16 S.Ct. 434, 480, 40 L.Ed. 606."

[9] Attacking these counts, defendant Kerner first claims that the indictment fails to charge that the proceeds of the unlawful activity were distributed after the use of the interstate facility or travel in interstate commerce. The indictment in this case identifies the offense the defendants allegedly conspired to commit and apprises them of what they must be prepared to meet and is sufficiently accurate to prevent a future prosecution. See United States v. Kahn, 381 F.2d 824, 829 (C.A. 7, 1967); United v. Airdo, 380 F.2d 103, 104 (C.A. 7, 1967).

He next claims that Counts II-V should be dismissed because the alleged connection between the illegal conduct charged and the alleged use of interstate commerce is purely incidential to the illegal conduct charged. He contends that this is an insufficient use of interstate commerce to bring the charged illegal conduct within the purview of 18 U.S.C. § 1952.

The defendant relies strongly on the case of United States v. Altobella, 442 F.2d 310 (C.A. 7, 1971), which held that the mailing of a check [drawn on a Philadelphia bank] and deposited by a third party endorser in a Chicago bank was an insufficient interstate act to come within

the Congressional intent behind 18 U.S.C. § 1952 because the use of the interstate facility was incidential to the extortion scheme and because the mailing was done by the bank.

He also relies on Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971), which held that in 1952 was not intended to reach criminal actively solely because it was patronized by out-of-state customers but was aimed primarily at organized crime of persons residing in one state while operating illegal activities in other states through interstate facilities. The Court in *Rewis* indicated an unwillingness to construe federal legislation so as to alter-sensitive state-federal balance, absent a clear Congressional mandate.

He likewise relies on United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L. Ed.2d 488 (1971). *Bass* construes in U.S.C.App. § 1202(a), which is ambiguous, as to whether proof that a firearm traveled in or affected interstate commerce was an essential element of the offense. The Court held that it was, because an ambiguity in a penal statute is resolved in favor of lenity. It was particularly concerned that a broad construction would permit a novel intrusion into traditionally state criminal jurisdiction and upset the delicate federal-state balance. The Court concluded that absent a clear statement of Congressional intent to alter this balance, none would be imputed. The relevance of *Bass* to the instant case is based on the above policy, that is, under the *Bass* philosophy of federal-state relations defendant contends 18 U.S.C. § 1952 should not be construed to reach an essentially intra-state crime.

The Government contends that the conduct charged in the indictment violates 18 U.S.C. § 1952 in that the checks mentioned in the indictment were an integral part of the bribery scheme. It relies on United States v. Lee, 448

F.2d 604 (C.A. 7, 1971), which observed that neither *Rewis* nor *Altobella* affected the validity of the convictions there on appeal. In *Lee* employees of an illegal activity in one state resided in another state from which they commuted. The jury was permitted to impute knowledge of this interstate travel to the proprietors' of the business. *Rewis* was distinguished on the basis of a distinction between interstate travel by customers and interstate travel by employees of the illegal business. *Altobella* was distinguished on the fact that there the isolated use of an interstate facility resulted from the act of the victim and not a participant in the unlawful enterprise.

In light of *Lee* the indictment appears to charge an offense under § 1952. The acts charged are alleged to have been instigated by participants in the bribery scheme set forth in the indictment.

Defendant argues that Congress enacted § 1952 with a specific intent of controlling organized crime in interstate commerce. He, therefore, contends that the deposit of checks for collection as charged in Counts II-IV, by itself, does not charge a violation of § 1952 but amounts to a meddling in state matters by the federal government. The Government answers that § 1952 was intended to deny the use of interstate facilities to those who corrupt public officials and that a deposit of a check for collection is such a use of an interstate facility. See United States v. Wechsler, 392 F.2d 344, 347, n. 3 (C.A. 4, 1968), cert. den. 392 U.S. 932, 88 S.Ct. 2283, 20 L.Ed.2d 1389.

The Ninth Circuit in United States v. Roselli, 432 F.2d 879 (C.A. 9, 1970) discussed the scope and legislative intent behind 18 U.S.C. § 1952. The Court pointed out that while Congress intended to strike at those illicit activities

that provide organized crime with its profits it did not limit the prohibitions of § 1952 to:

> ". . . only those persons who could be shown to be members of an organized criminal group . . . nor against only those kinds of gambling, liquor, narcotics, and prostitution offenses that racketeers were engaged in at the time Congress acted. The words of section 1952 are general; they contain no restriction to particular persons or to particular kinds of gambling, liquor, narcotics, and prostitution offenses."
> p. 885

[10, 11] The reasons for not restricting the class of persons covered by § 1952 is self-evident. It would be difficult, if not impossible, to prove a particular defendant's association with or control by a clandestine criminal organization. On the contrary, Congress intended to make § 1952 generally applicable to anyone engaged in an "unlawful activity" as defined in that statute. Bribery in violation of the laws of the state is clearly such an unlawful activity. There is nothing to suggest that Congress intended to restrict the statute to racketeers. The essence of the crime is the fraudulent scheme. The interstate communication merely provides a constitutional basis for the exercise of federal power. Therefore, knowing interstate travel or knowing use of an interstate facility is not an essential element of a violation of § 1952. United States v. Roselli, supra, 432 F.2d at 884-886, 890-891. Although the point raised by defendant is debatable, in the opinion of the Court the *Roselli* rationale is a more reasonable interpretation of Congressional intent.

Duplicity in Indictment under Travel Act

[12, 13] The duplicity charged in Counts II-V is based on the failure of the indictment to specify which subsections of the Illinois bribery statute are alleged to have

been violated. Such a multiple reference cannot be duplicitous. Duplicity is the charging of more than one offense in a single count. Counts II-V charge only a violation of § 1952. The reference to several state statutes does not increase the number of federal violations charged in each count. The uncertainty in this matter has been resolved by a request for particulars.

Statement of Offense under Mail Fraud Statute

[14] In his motion to dismiss Counts I and VI-XIII for failure to charge a violation of 18 U.S.C. § 1341, defendant Kerner contends that the conduct alleged is outside the purview of the statute. We disagree. There are numerous reported cases where state officials have been successfully prosecuted for corruption under this statute. United States v. Faser, 303 F.Supp. 380 (E.D.La., 1969), is in point. There elected and appointed state officials accepted bribes for arranging to have idle state funds deposited in the banks of the bribers. The defendants violated Louisiana law but federal jurisdiction was acquired by their use of the mails in furtherance of the scheme.

Shushan v. United States, 117 F.2d 110 (C.A. 5, 1941), involved a charge against state officials, including members of the Levee Board of Louisiana for using the mails in a scheme to defraud the State of Louisiana. In that case, the Court stated that depriving the State of fair judgment of its officers through corruption comes within the purview of the statute making it an offense to use the mails in effecting a scheme to defraud.

Another case relied upon by the Government is Bradford v. United States, 129 F.2d 274 (C.A. 5, 1942). That case involved a fraud in which a city official and his brother participated. The fraud related to the sale of

buses in which an exorbitant profit was made by the seller at the expense of the City. The Bradford brothers who had political influence were bribed to put the deal over. In affirming the jury verdict of guilty, the Court quoted from the Judge Sibley opinion in *Shushan*, supra, as follows:

> "'A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery but would also be a scheme to defraud the public. The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view. No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such a one must in the federal law be considered a scheme to defraud. The essential immorality of an arrangement of that sort, or even the use of undue personal influence, as illustrated in [citing cases]. We agree with appellants that the constructive frauds which equity in civil cases sometimes sets up to do justice will not suffice under this criminal statute; and that there must be a purpose to do wrong which is inconsistent with moral uprightness. In conceding, we think a scheme to defraud by corrupting an official and also by misrepresentation of results achieved is alleged.'"

129 F.2d p. 276.

Duplicity in Indictment under Mail Fraud Statute

It is further contended in this motion that the charges in Counts VI, VII, IX and XIII are duplicitous. These counts charge the delivery of certain letters in the Northern District of Illinois and the placing of these letters in the mails.

[15] Both the placing of any matter or thing, in the mails and causing it to be delivered are offenses within the meaning of § 1341, but they were merely alternative means, set out in the disjunctive, by which the mails may be used in violation of the statute. In the instant case, both alternative means were mentioned in each count, but the alternative means mentioned are based on the doing of only one act. Such a count is not duplicitous. United States v. Amick, 439 F.2d 351, 359 (C.A. 7, 1971); Fields v. United States, 408 F.2d 885 (C.A. 5, 1965); United States v. Zolli, 51 F.R.D. 522, 527 (E.D. N.Y., 1970). The only crime charged in these counts is that the defendants devised a scheme to defraud and used the mails to effectuate that scheme. These are the essential elements of the offense. See United States v. White, 355 F.2d 909 (C.A. 7, 1966); United States v. Johnson, 298 F.Supp. 58 (N.D.Ill., 1969).

For the reasons discussed, the various motions to dismiss various Counts I-XIII for failure to charge an offense against the United States or for duplicity are denied.

Duplicity in Perjury and False Statement Charges

Motion is made pursuant to Rule 12(b), F.R.Cr.P., for dismissal of Counts XIV and XV on the ground that they charge multiple offenses.

[16] The law forbids the charging of more than one offense in one count of an indictment for two reasons. First, the accused is denied the clear concurrence of all the jurors as to each offense charged as the basis of a conviction. Second, it is impossible for the jury to find him guilty of some offenses charged in the duplicitous count and not guilty as to others. United States v. Warner, 428 F.2d 730, 735 (C.A. 8, 1970). On this basis,

defendant asserts that it is not possible to determine whether the majority of the grand jury found the defendant probably guilty as to each or any one of the offenses charged in a duplicitous count. Gaither v. United States, 134 U.S.App.D.C. 154, 413 F.2d 1061 (1969); Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887).

[17] Count XIV charges perjury before the grand jury. 18 U.S.C. § 1623. Defendant asserts that § 1623 proscribes "any false material declaration" in the singular whereas Count XIV charges him with having made "false material declarations" in the plural. He submits that he was examined on three separate and distinct topics concerning which he allegedly gave false answers. As a consequence, he contends Count XIV charges three separate offenses. In the opinion of the Court the three separate topics are subsidiary to a more basic single question, to-wit, whether defendant Kerner had ever attempted to influence racing dates. Accordingly, only a single perjury offense is charged.

[18] Similarly Count XV charges a knowing and deliberate misrepresentation in a matter within the jurisdiction of an agency of the United States, namely, the Internal Revenue Service. The basis of the motion as to Count XV is the fact that it alleges six separate false statements. The Government contends that each of these statements was related to a single question, that is, the identity of the "Chicago Co." We agree.

[19] An indictment will not be held bad on the ground of duplicity if words employed present to the common understanding a single charge. Millard v. United States, 148 F.2d 154 (C.A. 5, 1945). Only one charge is stated in each of these counts of the indictment. The motion must be denied. Arena v. United States, 226 F. 2d 227, 236 (C.A. 9, 1955), cert. den. 350 U.S. 954, 76 S. Ct. 342 100 L.Ed. 830 (1956).

Statement of Offense under 18 U.S.C. Sec. 1001

[20] Defendant Kerner has moved to dismiss Count XV for failure to state an offense. The main issue raised by the parties in this motion is whether the statements allegedly made by Kerner to Internal Revenue Special Agents should be classified as affirmative statements that come within the purview of Section 1001, as the Government contends, or as exculpatory oral denials, as Kerner contends, and therefore beyond the purview of Sec. 1001.

The defendant relies upon Paternostro v. United States, 311 F.2d 298 (C.A.5, 1962) in support of this motion. In that case, the answers made by the accused were simple denials that were later determined to be false. The sole question was whether mere negative answers to certain questions propounded by federal agents constitute statements within the meaning of that word as it appears in Sec. 1001. The purpose of the statute as viewed by the *Paternostro* Court was to protect the Government from being victimized by positive statements which tend to prevent and affect normal government activities and functions. It cited with approval United States v. Levin, 133 F.Supp. 88 (D.C. Col. 1953).

In *Levin,* the defendant was charged with stating to an FBI agent that he had never told anyone that he had information as to the identity of a ladies dinner ring, when in fact had he been told of such information. It was held that the answer was not a statement within the meaning of Sec. 1001. The Court observed that an inquiry into cases of a minor nature, even civil, involving a willful false statement would constitute a violation and incur a potential penalty of up to five years imprisonment and/or a fine of $10,000.00, while the violation of the perjury statute only calls for a penalty of up to two years.

A case relied upon by the Government to sustain Count XV is Knowles v. United States, 224 F.2d 168 (C.A.10, 1955). In that case, the accused contended that Sec. 1001 does not reach oral and voluntary statements made to investigating officers which are not required by law, rule or regulation to be given to an agency or department of the Government. The Court held that the statement to an Internal Revenue Agent in the course of an authorized inquiry into correctness of taxpayer's returns is a statement made "within the jurisdiction of any department or agency of the United States." The materiality of the statement was a question but the Court held there was no doubt of materiality.

Concerning the materiality issue, *Paternostro* decided that the indictment before it contained the elements of the offense even though the specific allegation of materiality was lacking. The Court stated that an examination of the record in the case convinced it that the defendant was fully apprised of the nature of the grand jury investigation and that the indictment was sufficient. This is true in our case.

The Government relies upon United States v. McCue 301 F.2d 452 (C.A. 2 cert. den. 370 U.S. 939, 82 S. Ct. 1586, 8 L.Ed.2d 808 (1962), which involved false statements made by the defendant relative to a drilling of wells on his property. Inquiry was made of him as to who negotiated for the drilling of wells on his place and he replied that he had no idea. He was asked who paid for the well drilling operation and he replied that he did not know. He falsely stated that he didn't pay for the expenses and did not authorize the payment and knew nothing about it. He also made false answers with respect to places that he visited on the dates shown on certain memos. The Court recognized that there was some

division of opinion as to whether the citizen's reply to an agent with an "exculpatory no" is within the purview of the statute. The Court held however, that the great weight of authority supported the applicability of the statute to the circumstances of that case. The only case cited supporting a contrary result was United States v. Philippe, 173 F.Supp. 582 (S.D.N.Y. 1959). The Court rejected its reasoning and its result.

In the opinion of the Court the statements allegedly made are within the purview of Sec. 1001 and the motion is, therefore, denied.

Motion for Government's Evidence

The motion for an order requiring the Government to state whether it intends to offer in evidence at the trial any statements of any of the defendants other than statements of defendant Kerner, requiring production to the Court of said statements, and if any of the statements tend to be inculpatory to defendant Kerner as to any of the offenses alleged in the indictment, severance of defendant Kerner for separate trial from the other defendant who made the statement in question is denied.

[21] The Government is not required to turn over its evidence to the defendants in advance of the trial. See United States v. Conder 423 F.2d 904 (C.A. 6, 1970); Hemphill v. United States, 392 F.2d 45 (C.A.8, 1968); United States v. Evanchik, 413 F.2d 950 (C.A.2, 1969); United States v. Fioravanti, 412 F.2d 407 (C.A.3, 1969) cert. den. Panaccione v. United States, 396 U.S. 837, 90 S.Ct. 97, 24 L.Ed.2d 88. If it has any statement of defendant Kerner, it will produce said statement for inspection and copying by defendant Kerner.

Motion for Inspection of Documents

Defendant Kerner has moved pursuant to Rule 16, F.R.Cr.P., and Rule 6, for an order directing the United States Attorney to permit the defendant to inspect and copy a number of items. The motion is granted as to paragraph 5 and denied as to paragraphs 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. The Government has supplied the information sought in paragraphs 1 and 4.

Motions of Defendant Isaacs

Motion for Election of Counts

[22] Defendant Isaacs has moved for an order compelling an election between the conspiracy and the substantive counts of the indictment. The conspiracy is a separate and distinct crime from the substantive offenses, and the motion is denied. See Callanan v. United States, 364 U.S. 587, 593, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961); Pereira v. United States, 347 U.S. 1, 11, 74 S. Ct. 358, 98 L.Ed. 435 (1954); Pinkerton v. United States, 328 U.S. 640, 644, 66 S. Ct. 1180, 90 L.Ed. 1489 (1946).

[23] He has moved for an order compelling an election between the eight counts charging substantive violations of the mail fraud statute on the ground that the separate mailings were merely incidental to a single fraudulent scheme and, therefore, constitutes a multiplication of offenses. We do not agree. The motion is denied. See Badders v. United States, 240 U.S. 391, 393-394, 36 S.Ct. 367, 60 L.Ed. 706 (1916); United States v. Hopkins, 357 F.2d 14 (C.A.6, 1966), cert. den. 385 U.S. 858, 87 S.Ct. 107, 17 L.Ed. 2d 84; United States v. Browne, 225 F.2d 751, 755-756 (C.A.7, 1955).

[24] He also has moved for an order to compel an election between the four counts alleging substantive vio-

lations of the Travel Act on the ground that the illegal scheme rather than an entrance into interstate commerce constitutes the proscribed conduct. We disagree. See United States v. Teemer, 214 F.Supp. 952, 958 (N.D.W.Va.1963); United States v. Zirpolo, 288 F.Supp. 993, 1022—1023 (D.N.J.1968), reversed on other grounds 450 F.2d 424 (C.A.3, 1971).

[25] In any event the Government should not be compelled to elect counts until its proof has been presented. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225, 73 S.Ct. 227, 97 L.Ed.260 (1952).

Motion to Suppress Evidence

Defendant Isaacs has moved to dismiss the indictment or alternatively, to suppress evidence on the ground that Special Agents of the Intelligence Division, Internal Revenue Service, interviewed him, and his accountant, while he was the subject of a criminal investigation and (1) failed to give him his *Miranda* warning and (2) misrepresented that he was not the subject of a criminal investigation

[26] When illegally obtained evidence is discovered, the proper remedy is suppression of it and its fruits. Dismissal of the indictment is inappropriate unless the Government concedes that its only evidence is tainted. United States v. Blue, 384 U.S. 251, 255 n. 3, 86 S. Ct. 1416, 16 L.Ed.2d 510 (1965); United States v. Tane, 329 F.2d 848, 853-854 (C.A.2, 1964). See also, Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). Accordingly, the motion to dismiss is denied.

Affidavits have been submitted both in support of and in opposition to this motion. From these, the following facts appear not to be in dispute: The interviews in question took place on July 15, 1970, December 3, 1970, De-

cember 4, 1970 and January 13, 1971. On January 5, 1971, he had a telephone conversation with a special agent. He was advised at the July 15, 1970, and again at the December 3, 1970, interviews that he was not the subject of a criminal investigation; that the investigation involved Judge Kerner and Mr. Miller; and, that he did not have to talk to the agents if he chose not to do so. On January 13, 1971, he was advised for the first time that he was the subject of a criminal investigation. Isaacs is an attorney with no experience in federal income tax prosecutions.

Isaacs states that on information and belief he was the subject of a criminal investigation prior to January 13, 1971, and further that he was never given the *Miranda* warning.

Government affidavits show that Isaacs first became the subject of a criminal investigation on January 5, 1971, and that he was so advised on the first personal contact subsequent thereto, to-wit, January 13, 1971. All prior contacts concerned his capacity as a potential witness in the Miller-Kerner investigation. He was given a full *Miranda* warning on July 15, 1970, December 3, 1970, and January 13, 1971. On both December 3, 1970 and January 13, 1971, he acknowledged understanding his Fifth Amendment rights.

[27, 28] A taxpayer undergoing non-custodial interrogation is entitled to a full *Miranda* warning on the agents' first contact with him after the case has been transferred to the Intelligence Division. United States v. Dickerson, 413 F.2d 1111 (C.A.7, 1969). Even if the Government misrepresented the nature of their inquiry, evidence freely supplied by the accused is still admissible. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L. Ed. 2d 684 (1969).

The Government conceded that Isaacs may have believed in July, 1970 that he was the subject of a criminal investigation but submits that this belief cannot be imputed to the Government agents on the basis of that belief alone.

On this record, there is a question of fact, i.e., whether Isaacs was a de facto or official subject of a criminal investigation prior to January 15, 1971, if so, there is an additional question as to whether and when he was given the full *Miranda* warning. In the opinion of the Court even if the status of the investigation was misrepresented to Isaacs, if the full *Miranda* warning was given him there is no reason to suppress any evidence he subsequently supplied. Thus, a decision on this motion hinges on a question of fact, that is, whether Isaacs was given a full *Miranda* warning and, if so, when. An evidentiary hearng has been granted on this question.

Prejudicial Delay

[29] Defendant Isaacs has moved for dismissal of the indictment because of prejudicial delay in the commencement of prosecution. The prejudice asserted is: "(a) recollections of potential witnesses . . . have dimmed; (b) material evidence may have been misplaced or destroyed; (c) the investigation and discovery of matters related to the defense will be substantially impeded." These assertions are conclusory. The concept of delay as applied to this motion seems to rest on the fact that the indictment returned December 15, 1971 refers to events transpiring between 1960 and 1968. Isaacs appears to believe that the statute of limitations on a conspiracy charge should begin to run when the scheme is first conceived rather than with the last overt act alleged.

Such a contention cannot be sustained. United States v. Marion, 404 U.S. 307, 320-322, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Motions of Defendant Miller

Motion for Inspection

Motion of defendant Miller for inspection and copying is granted as to paragraphs 3 and 4 and denied as to paragraphs 5, 6, 7, 8, 9, 10, 11 and 12. The Government has supplied the information sought in paragraphs 1 and 2.

Motion for Additional Discovery and Inspection

Motion for additional discovery and inspection of documents is granted as to paragraph 8 and denied as to paragraphs 1, 2, 10, 33, 37 and 38. The Government has supplied the information sought in paragraphs 3, 4, 5, 6, 7, 9, 11, 12, 13 through 32, 34, 35 and 36.

Motion for Disclosure

[30] Defendant Miller has filed a motion for disclosure of exculpatory information as required by Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). The Government has acknowledged its obligation to furnish all *Brady* material in its possession but states its belief that it possesses no such material. *Brady* does not afford a general right of discovery. United States v. Evanchik, supra, 413 F.2d at 953. Assurance by the Govenent that it does not possess undisclosed exculpatory evidence absent a particularized showing of its existence and materiality will support denial of a motion for inspection. United States v. Crisona, 416 F.2d 107, 116 (C.A. 2, 1969); United States v. Evanchik, supra. The motion must be denied.

Motion to Dismiss Counts I through V

Defendant Miller has filed a motion to dismiss Counts I through V for failure to state an offense against the United States, or Counts II through V for duplicity. This motion is identical to one filed by defendant Kerner. This motion is denied for the same reasons that the motion of defendant Kerner is denied.

Motion to Dismiss Indictment

The motion to dismiss the indictment because of the presence of unauthorized persons in the grand jury room has been discussed under Kerner's motions.

Motion for Reassignment

Defendant Miller has moved for reassignment of this case to another judge in accordance with the local rules of the United States District Court for the Northern District of Illinois. This issue has been previously decided by the Executive Committee of said Court and their action has been affirmed by the United States Court of Appeals for the Seventh Circuit. Accordingly, the motion must be denied.

Motion to Dismiss for Alleged Bias of Grand Jury

[31-33] Defendant Miller has moved for dismissal of the indictment on the ground of alleged bias of grand jury due to the facts that he twice appeared before it despite the fact that he was a prospective defendant and that there had been prejudicial news publicity concerning the grand jury investigation. A prospective defendant may be compelled to appear before the grand jury even though he indicates that he intends to rely on the Fifth Amendment. United States v. Addonizio,

313 F.Supp. 486 (D.C.N.J., 1970) aff'd 451 F.2d 49 (C.A. 3, 1971), cert den. 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed 2d 812 (1972). A reading of the transcript of Miller's testimony before the grand jury shows that he was treated fairly and provided every opportunity to consult with counsel. He did answer some questions and identify certain corporate records. More than a mere conjecture of bias from the presence of adverse publicity is necessary to warrant an evidentiary hearing or dismissal of an indictment. See Estes v. United States, 335 F. 2d 609, 613 (C.A. 5, 1964), cert. den. 379 U.S. 964, 85 S. Ct. 656, 13 L.Ed.2d 559 (1965); Lawn v. United States, 355 U.S. 339, 78 S.Ct.311, 2 L.Ed.2d 321 (1958). The motion must be denied.

Motions of Defendant Knight

Motion for Examination of Exculpatory Evidence

[34] Defendant Knight has moved for an order permitting his examination of any exculpatory evidence in possession of the Government, a list of documents concerning the case that will not be introduced into evidence, a list of persons known to the Government to have some knowledge of the case, and a list of statements of persons whom the Government will not call to testify. He submits that he is entitled to this information pursuant to Brady v. Maryland, supra. The order requested goes far beyond the scope of the *Brady* rule. Further, the Government acknowledges its responsibility under *Brady* to disclose any exculpatory evidence in its possession, but denies the existence of such evidence. The motion must, therefore, be denied.

Motion to Dismiss Indictment for Artifice

[35] Defendant Knight has moved to dismiss the indictment on the ground that it was obtained by trick and artifice, because he was compelled to testify before the grand jury and was misled to believe that he was not a putative defendant. The motion is denied. See United States v. Addonizio, supra.

Motion to Dismiss for Uncertainty

Defendant Knight has moved to dismiss the indictment on the ground of uncertainty, failure to state an offense and indefiniteness. A careful reading of the indictment rebuts this claim. The motion is dened.

Motions of Defendant McInturf

Motion to Dismiss

[36] Defendant McInturf has moved for dismissal of the indictment or, alternatively, for suppression of her grand jury testimony on the grounds that she was in the position of a defendant, did not have the assistance of counsel and was not advised of her constitutional rights at the time of her grand jury testimony. The Government has submitted an affidavit showing that Miss McInturf was not a potential defendant at that time. There is no opposing affidavit. The transcript of her grand jury testimony shows that she had been advised of her constitutional rights by her own counsel and that she had counsel in attendance and available for consultation at that time. It is apparent that her rights were not violated as she asserts. Accordingly, the motion must be denied.

Motion for Discovery

On defendant McInturf's motion for discovery, paragraphs 1, 2, 3, 4, 5, 12, 17, 26, 27, 28, 30, 31, 32 and 36 are denied and the motion as to paragraph 33 is sustained as to those who may have been in the grand jury room if any but whose presence was not authorized by Rule 6(d), F.R.Cr.P. The Government has supplied the information sought in paragraphs 6—11, 13—16, 18—25, 29, 34 and 35.

Motions of All Defendants

Motions for Joinder and Severance

There are nine motions dealing with questions of joinder and severance based on a variety of arguments.

[37-43] The general rule is that persons jointly indicted should be tried together, particularly where a conspiracy is charged and may be proved against all defendants by the same evidence but, a joint trial may not be had at the expense of a defendant's right to a fair trial. Severance should be granted only when it appears that a joint trial will prejudice one or more of the defendants. The burden is on the defendant to show such prejudice as will compel a severance. United States v. Kahaner, 203 F.Supp. 78 (S.D.N.Y.1962); United States v. Kahn, 381 F.2d 824, 838—839 (C.A.7, 1967). Under the law of joinder satisfaction of Rule 8(b) in multi-defendant cases precludes application of Rule 8(a) as to each single defendant. See Williams v. United States, 416 F.2d 1064, 1068 (C.A.8, 1969); United States v. Friedman, 445 F.2d 1076, 1082-1083 (C.A. 9, 1971); Roselli v. United States, 432 F.2d 879, 898 (C.A.9, 1970), cert. den. 401 U.S. 924, 91 S.Ct. 883, 27 L. Ed.2d 828 (1971). Even dissimilar charges may be joined against multiple defendants if they arise out of the same series of transac-

tions constituting an offense or offenses. *Friedman*, supra 445 F.2d at 1082. Criminal violations of the federal income tax law may be properly joined with non-tax charges in an indictment if the tax charges arise out of and are factually related to the same scheme or series of transactions as all other counts in the indictment. *Roselli*, supra, 432 F.2d at 898. Where co-defendants are charged with a conspiracy and separate substantive offenses, and there is a connecting link between the conspiracy and the substantive offenses, the counts are not misjoined. United States v. Godel, 361 F.2d 21 (C.A.4, 1966).

Thus, the question is whether the conduct on which each count is based is a segment of a series of factually related transactions constituting, in essence, a common scheme in which all defendants, at some point, participated. United States v. Amick, 439 F.2d 351, 360 (C.A. 7, 1971); United States v. Scott, 413 F. 2d 932, 935 (C.A. 7, 1969), cert. den. 396 U.S. 1006, 90 S.Ct. 560 24 L.Ed.2d 498 (1970).

Counts I-XIII of the instant indictment charge a conspiracy whereby certain companies in the horse-racing business received preferential treatment from defendants which caused said companies to flourish financially. In return for the preferential treatment, defendants received income by means of a series of stock transactions designed to conceal the scheme. The conspiracy counts involve all five defendants and charge violations of federal statutes.

Counts XVI-XIX charge Kerner and Isaacs with failing to report income received as an alleged bribe as ordinary income and with willfully subscribing to a false income tax return. The first charge concerns the fruits of the conspiratorial acts and the second concerns the attempt to conceal ownership of the fruits. Thus, these

counts are factually related to the conspiracy and require similar proof. See Roselli v. United States, supra.

[44] Counts XIV and XV charge Kerner with perjury before the grand jury and with making false statements to agents of the Government. There is an identity of proof between these counts and the conspiracy count since the alleged false statements are factually related to the alleged conspiratorial scheme. See United States v. Verra, 203 F.Supp. 87, 90 (S.D.N.Y.1962). Thus, it is apparent that all counts in the instant indictment are properly joined.

[45, 46] All defendants request severance on the grounds of prejudicial joinder and inculpatory statements of their co-defendants. In general, severance of defendants where conspiracy is charged requires a showing of exceptional circumstances. See United States v. Kahn, 381 F.2d 824, 838—839 (C.A. 7, 1967), cert. den. 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661 (1967). See also United States v. Blue, 440 F.2d 300, 302 (C.A. 7, 1971). The danger of prejudice in this case can be avoided by admonitory instructions on the charges incidental to the conspiracy. See United States v. Turner, 274 F.Supp. 412, 416 (E.D. Tenn. 1967); United States v. Cozzetti, 441 F.2d 344, 348—349 (C.A. 9, 1971). As to the inculpatory statements, Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), has no application in a conspiracy case to a statement of a co-conspirator made in furtherance of the conspiracy and during its pendency. This is an acknowledged exception to the hearsay rule. See Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

[47] Miller contends that his inability to call his co-defendants as witnesses will prejudice him. Absent a clear showing of specific prejudice, the motion is without merit. See United States v. Johnson, 426 F.2d 1112,

1116 (C.A. 7, 1970). The desire of a defendant to call a co-defendant as a defense witness will not support a claim that separate trials would be less prejudicial than a joint trial since the co-defendant would be just as likely to assert his constitutional privilege against self-incrimination when called as a witness at a separate trial as he would as a defendant at a joint trial. United States v. Leighton, 265 F.Supp. 27, 31 (S.D.N.Y.1967).

He contends that the publicity given this case prejudices his right to a fair trial. No reason has been suggested to show that the publicity complained of will prevent a fair trial. See Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

Miller also has moved for severance on the ground that the Government filed, then withdrew, memoranda of two informal conferences where he was promised that any statements made therein would not be used against him. The Government has answered the motion with a statement that it will not introduce any statement of Miller made at those conferences in the trial on the merits. While the Court is unable to find any relationship between prayer and the ground in the motion, it is clear that the Government's answer is sufficient.

In conclusion, all motions of all defendants concerning joinder and severance are denied.

Motions for Bills of Particulars

The number of requests for particulars sought by individual defendants are eight by Isaacs, twenty-six by McInturf, forty-six by Kerner, and two hundred seven by Miller. (Defendant Knight has moved to adopt each of these requests as his own.) Many of these requests are repetitious or patently beyond the scope of a bill of particulars. Of particular note is the fact that defen-

dant Miller's request No. 50 asks for the identity of "certain persons" referred to in Count 1 paragraph 18(a) of the indictment. Said paragraph, so far as we can determine contains no reference to "certain persons."

The following particulars are granted.

Kerner: 5, 10, 11, 12, 13, 16, 18, 26, 41 (a).

Miller: 2, 3, 24, 40, 43, 56, 57, 58, 63, 65, 73, 157, 175, 177, 181, 204.

Isaacs: 7, 8.

McInturf: 1, 7(c).

[48-51] The Govervent has opposed other requests on a number of grounds. Particulars are supplied to clarify the nature of the offenses charged and the ultimate facts necessary to avoid surprise or double jeopardy. When more than this is requested the request is in the natue of a demand for evidentiary detail. The Government is not required to supply its evidence in advance of trial. United States v. Long 449 F.2d 288, 294—295 (C.A. 8, 1971). United States v. Boneparth, 52 F.R.D. 544, 545 (S.D.N.Y.1971). In addition, information supplied in the indictment need not be restated in a bill of particulars. United States v. Boneparth, supra. Requests for particulars equally available to the defendants should be denied Mims v. United States, 332 F.2d 944, 946-947 (C.A. 10, 1964). The Government's legal theory of the case is not obtainable by way of a motion for a bill of particulars. See Kempe v. United States, 151 F.2d 680 (C.A. 8, 1945). United States v. Dioguardi, 332 F. Supp. 7 (S.D.N.Y.1971); Turner v. United States, 426 F.2d 480, 483 (C.A. 6, 1970); United States v. Spomar, 217 F. Supp. 897 (N.D.Ill. 1963). The following requests are denied:

Kerner: 1, 15, 19, 20, 22 (except as to subsection (d)), 28 (except to the extent supplied, 29, 30, 31, 33, 34, 35, 36, 39(a), 40, 41, 42, 43, 44.

Miller: 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 26, 27, 28, 31, 32, 33, 36, 37, 38, 39, 41, 42, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 59, 60, 61, 62, 64, 66, 67, 68, 69, 70, 71, 72, 76, 77, 78, 79, 80, 81, 82, 83, 85, 87-115, 117-151, 153 (except to the extent supplied), 154, 155, 156, 158, 159 (except to the extent supplied), 160, 161, 162 (except to the extent supplied, 164, 165 (except to the extent supplied), 166, 168, 169, 170, 171, 173, 174, 176, 178, 179, 180, 182, 183, 184, 185, 186, 187, 188 (as to the specification of applications, but granted as to general nature of the fraud), 189 except to the extent supplied), 190, 191, 192, 193, 195, 196, 197, 198, 199, 200, 201, 202, 203, 205, 206, 207.

Isaacs: 1, 2, 3, 4, 5, 6.

McInturf: 2, 3, 4, 5, 6, 7 (a) (b), 8, 9, 10, 11 (a) (b) (c), 12 (a) (b) (c), 13-26.

The defendants have filed numerous requests for particulars concerning the indictment. It should be noted at the outset that this nineteen-count indictment is sixty-four pages long. The conspiracy count describes in great detail the object of the conspiracy as well as charging sixty-eight specific overt acts. Thus, the indictment itself contains specific particulars to put defendants on notice of the specific charges against them so as to prevent double jeopardy and surprise.

In response to these requests, the Government has supplied much information. It appears that the following requests have been satisfied:

Kerner: 2, 3, 4, 6, 7, 8, 9, 17, 21, 23, 24, 25, 27, 37, 38, 39.

As to paragraph 32, the rulings made under Count I apply to Counts VI-XIII and are reaffirmed and adopted as to these counts.

As to paragraph 14 the motion is denied as to the

calendar year 1966 because Count No. XVI gives the substance and information sought. The motion is granted as to the calendar year 1967.

Miller: 1, 18, 29, 30, 34, 35, 74, 75, 84, 86, 116, 152, 167, 172, 194.

As to paragraph 7, the Government has sufficiently answered except as to the nominee, which should be furnished.

We were advised by Government counsel during the oral argument that the Government has agreed in its answer to furnish all documents mentioned in Counts II through XIII; also documents of defendant in Government's possession; all documents of third parties in possession of the Government. Finally, the Government has agreed to furnish the originals of its own documents.

In sum, it is ordered that each of the motions of the defendants be, and same hereby is, denied except as heretofore indicated.

MEMORANDUM

June 14, 1972

Robert L. Taylor, District Judge.

For consideration are those motions on which evidentiary hearings were granted following oral arguments on May 17, 1972, and those motions filed after the deadline for preliminary motions agreed to by counsel for all parties, to wit, March 20, 1972.

The motion of defendant Kerner to dismiss the indictment because of the presence of unauthorized persons in the grand jury room was withdrawn during the hearing on that motion. Judge Kerner identified the former Revenue Agent, T. R. Johnson, whom he had deposed was in the grand jury room in his affidavit in

support of his motion. However, he stated Mr. Johnson was not the same man he observed in the grand jury room when he was testifying, but the man who was there resembled Mr. Johnson so closely as to be his identical twin. The motion having been withdrawn, further consideration is unnecessary.

KERNER'S MOTION TO DISMISS COUNT XV

[1] Testimony was heard on Judge Kerner's motion to dismiss Count XV for the Government's destruction of essential evidence. The question presented was whether the destruction of the rough notes made by Internal Revenue Service Special Agents Stufflebeam and Campbell during an interview with Judge Kerner which were incorporated into a memorandum of interview on the day of the interview amounted to an impermissible destruction of evidence in violation of due process. See Killian v. United States, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed. 2d 256 (1961). These notes are particularly important in the instant case because the essence of Count XV is an alleged misrepresentation of fact to federal agents performing an official inquiry. See 18 U.S.C. Sec. 1001.

Both Stufflebeam and Campbell testified that they began the interview by presenting Kerner with a letter informing him that he was the subject of a criminal investigation and by advising him of his fifth amendment rights. Each said that his own notes were key words and phrases chosen to jog his own memory as he prepared a formal memorandum of interview. Each has a personal policy of destroying rough interview notes once the formal memorandum of interview is in final

form to avoid duplication of records and because time erases from his memory the meanings he originally attached to the key words. The Internal Revenue Service leaves the question of destruction of rough interview notes to the individual agent.

Stufflebeam has followed the practice of destroying rough notes for as long as he has worked for the Service. The memorandum of interview quotes the *Miranda* warning as he read it verbatim from a printed card. Stufflebeam cannot tell from the memorandum what portions came from his notes as opposed to his recollection alone. Prior to destroying the rough notes he always compares them with the final draft of the memorandum of interview to assure the completeness and accuracy of the latter. At the time of the interview he had no thought that the memorandum might become the basis of a Section 1001 charge.

Campbell testified that he had never discussed with Stufflebeam whether to retain or destroy their rough interview notes. On reading the memorandum of that interview he said that his rough notes covered the entire memorandum with one or two words keying a whole paragraph. He recalled using key phrases such as "financial institution", "Isadore Brown", and "on recommendation of broker". Campbell has had no prior Section 1001 experience nor did he think of a possible Section 1001 prosecution at the time of the interview, preparation of the memorandum and destruction of his rough notes.

We conclude that the destruction of these interview notes was not a wilful or careless destruction of evidence and that the defendant has not been sufficently

prejudiced to warrant dismissal of Count XV. Accordingly, the motion is denied.

ISAACS' MOTION TO SUPPRESS

An evidentiary hearing was held on defendant Isaacs' motion to suppress evidence derived from certain interviews with Internal Revenue Special Agents on the ground that they failed to give him a *Miranda* warning when he was a subject of a criminal investigation. See United States v. Dickerson, 413 F.2d 1111 (C.A. 7, 1969). In our memorandum opinion filed May 30, 1972, 347 F.Supp. 743, we limited the issues for this hearing to a determination of when Isaacs was first given a full *Miranda* warning and when he first became the subject of a criminal investigation.

Despite a lengthy, detailed and thorough hearing, the parties failed to present any material fact not previously shown by their affidavits. Their respective positions and the factual disputes are accurately set forth on pages 27-29 of our memorandum of May 30, 1972, which are incorporated herein by reference.

Isaacs testified in minute detail as to the events transpiring at each of the interviews in question. He also produced personal notes of these interviews which he said he made on each occasion. He remained unequivocal in his position that he was never warned of his constitutional rights.

Isaacs is a practicing attorney who graduated from law school some thirty-five years ago. He testified that he had heard of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We are convinced that he was aware of his Fifth Amendment right to not incriminate himself.

Stufflebeam testified that he advised Isaacs at an interview on July 15, 1970, that Kerner and Miller were under investigation and that Judge Kerner had referred him to Isaacs for information concerning certain racetrack stock transactions. Due to Isaacs' possible involvement in these transactions, which were under criminal investigation, Stufflebeam testified that he informed Isaacs of his Fifth Amendment rights. Campbell testified that he did not recall seeing Isaacs take any notes during that interview.

Both Stufflebeam and Special Agent Witkowski testified that Isaccs was advised of his constitutional rights at the inception of the interview on December 3, 1970, and January 13, 1971.

[2] We find from the preponderance of the evidence that Isaacs was fully informed of his Fifth Amendment rights at his first interview with Internal Revenue Special Agents. We further find that he became the subject of a criminal investigation on January 5, 1971, and that his status as the subject of a criminal investigation was never misrepresented to him. Accordingly, there is no basis for suppressing any evidence obtained from Isaacs as a result of the aforementioned interviews. The motion is denied.

KNIGHT'S MOTION TO DISMISS THE INDICTMENT

An evidentiary hearing was granted defendant Knight on his motion to dismiss the indictment as to him on the ground that it was obtained by trick or artifice because Knight was compelled to testify before the grand jury and was misled to believe that he was not a putative defendant. From the testimony presented, several facts appear.

Knight testified before the grand jury on two occasions: March 11, 1971, and March 18, 1971. On these occasions he was accompanied by counsel. He was never given a formal *Miranda* warning.

Justice Department attorney Victor Worheide was asked by an Assistant United States Attorney-General to conduct a grand jury investigation to ascertain the true facts concerning certain allegations relevant to this case. Knight was called as a witness because he was believed to have some knowledge of relevant facts. Worheide denied that he, or anyone else to his knowledge, ever said that Knight was not a subject or target of an investigation. He said he informed Knight, and Knight's counsel, that the grand jury was conducting an exploratory investigation and was not specifically seeking an indictment. He also said that Knight's counsel informed him that Knight had been advised of his constitutional rights.

This motion is based on an allegation that the Government already had the information to which Knight testified and that he was already marked for prosecution. Internal Revenue Special Agent Stufflebeam testified that Knight did not become the subject of an investigaton until June 18, 1971. The occasion for opening the investigation was the preparation of a final report on the I.R.S. investigation wherein Stufflebeam and Special Agent Witkowski drew together data they had collected in several file cabinets. As this data was studied, a pattern emerged in which Knight played a significant role. Only then did he become a subject instead of a potential witness. Worheide testified that, although he was familiar with many documents which might have shown that Knight was involved in certain transactions, the au-

thenticity of these documents was uncertain. There were many unanswered questions about these transactions. Knight was called as a witness with the hope that he could answer some of these questions. At the time he testified there was no thought of seeking an indictment against him.

[3] The preponderance of the evidence presented, including an *in camera* inspection of the transcript of Knight's grand jury testimony, shows that Knight has not been prejudiced by any trick or artifice relating to his testimony before the grand jury. Even if the indictment had been based on illegally obtained evidence, this is not a ground for dismissal of the indictment. See United States v. Addonizio, 313 F.Supp. 486, 495 (D.N.J.1970) aff'd 451 F.2d 49 (C.A. 3, 1971), cert. denied 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). Accordingly, the motion must be denied.

KERNER'S MOTION RELATING TO ALLEGED BRIBERY OF A WITNESS

[4] Defendant Kerner has moved for an evidentiary hearing concerning allegations that the United States Attorney in cooperation with the Department of Justice sought and obtained for Mrs. Marjorie L. Everett, an alleged prospective witness, a California license to become a director of the Hollywood Park Turf Club without a public hearing and despite her implication in the bribery charged in the instant indictment. He contends that the United States Attorney bribed or rewarded Mrs. Everett in violation of 18 U.S.C. Sec. 201 (h). His charge appears to be based on newspaper reports that the United States Attorney went to California and met with certain state officials to persuade them not to hold a public hear-

ing and thereby subject Mrs. Everett to cross-examination on the subject matter of the instant indictment. The sole foundation for this motion is the inference that the award of a temporary license to Mrs. Everett was a bribe intended to influence her testimony in the instant case. Such general, conjectural allegations are not sufficient to warrant an evidentiary hearing. See Cohen v. Untied States, 378 F.2d 751, 760-761 (C.A. 9, 1967).

The recent decision of Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) that the Government must disclose a promise of leniency made to a key witness in return for his testimony implies that suppression is not an appropriate remedy. We would expect the Court in *Giglio* not to have ordered a new trial, or alternatively to have ordered suppression of Taliento's testimony in a second trial, if the Government's reward of leniency warranted suppression. Instead the Court held that evidence of the promise was "relevant to his credibility and the jury was entitled to know of it". 405 U.S. at 155, 92 S.Ct at 766. Even if Mrs. Everett's temporary California license was a reward for her future testimony (and we intimate no view on that question), we can discern no material difference between it and the promise of leniency in *Giglio,* Accordingly, the motion is denied.

Defendants Knight and Isaacs filed motions for the production of evidence at the evientiary hearings held from May 31 through June 2, 1972. In the opinion of the Court these motions were disposed of at the hearing. To the extent that they were not then granted, they are denied.

MEMORANDUM OPINION OF APRIL 19, 1973

Defendant Kerner has moved for a judgment of acquittal or, alternatively, for a new trial. The motions state that their grounds are set forth in the accompanying memorandum. That document is 76 pages long and incorporates by reference all prior motions, memoranda, which encompass hundreds of pages, and the transcript, which is several thousand pages long. The multitude of arguments thus raised precludes an exhaustive written consideration of the merits of the post-trial motions. The Court is compelled to assume that the reader is thoroughly familiar with the entire record of this lengthy and complex case. We are further required to partially limit this opinion to matters on which the Court has not adequately explained its reasoning.

Initially, Kerner attempts to impeach the verdict with an argument that it was impossible for the jury to conscientiously weigh the evidence on each count as to each defendant during the approximately fifteen hours of deliberation. This argument has a speculative basis which cannot sustain the motion.

Kerner says that the Court reserved decision on certain of the counts. The fact is that the Court overruled the motions as to all counts without prejudice to the defendants to renew. The Court pointed out that it would read and study the briefs an additional time and after doing so if it felt that it had erred, it would reconsider some of the questions and turn in a memorandum opinion. Tr. 5666-67.

Each of Counts II through V are based on aspects of the CHR transaction. Kerner contends that there is

no proof that defendants' purchase and sale of CHR stock was part of a bribery scheme. The proof showed that defendants purchased this stock at less than its real value; that the ultimate source of these shares was the same as for the CTE shares; that defendants sold their CHR shares within a year at a price possibly less than the real value but five times the purchase price; and that the profit acquired through the CHR sale was used to pay off the loan with which the CTE shares were purchased. This circumstantial evidence is sufficient to permit the inference that the CHR transaction was part of the overall bribery scheme as charged in the indictment.

The Government is not required to prove that the defendants had actual or constructive knowledge of interstate travel or of the use of interstate facilities to promote the alleged bribery scheme in order to make a case under the Travel Act. See 18 U.S.C. Sec. 1952; *United States* v. *Miller,* 379 F.2d 483, 486 (C.A. 7, 1967). *United States* v. *Roselli,* 432 F.2d 879, 891 (C.A. 9, 1970), The Court is of the opinion that the deposit of a check in interstate banking channels, regardless of whether the check crosses state lines, is a use of an interstate facility within the meaning of the Travel Act. See *United States* v. *Wechsler,* 392 F.2d 344, 347 n.3 (C.A. 4, 1968), *cert.den.* 392 U.S. 932.

Count V charges that between December 16, 1966, and April 1, 1967, the defendants caused Miller to travel between the Northern District of Illinois and Miami, Florida, with intent to promote, manage and carry on, etc. bribery in violation of Illinois law. The Travel Act requires that the interstate travel be accompanied by such an intent. 18 U.S.C. Sec. 1915(a). The proof in this case

showed that Miller had a winter home near Miami, Florida, where he had spent every winter for seventeen years. The proof also showed that during the 1966-67 winter a meeting was held in Florida attended by two of the alleged conspirators, and others, that concerned CHR stock ownership and related corporate problems. The Court does not recall any proof that the purpose of this interstate travel was to promote, manage or carry on the alleged bribery scheme even though Miller testified for the Government under an immunity agreement.

As we understand the Congressional intent behind the Travel Act, the purpose behind the interstate travel must be the promotion, etc., of an unlawful activity. Absent proof connecting the intent to engage in the unlawful activity with the specific interstate travel, or use of interstate facilities, a conviction under the Travel Act cannot be sustained. See *United States* v. *Hawthorne*, 356 F.2d 740, 741-42 (C.A. 4, 1966). The evidence in this case, as recalled by the Court, permits a strong inference that the alleged interstate travel was for a purpose and with an intent unrelated to the alleged unlawful activity. We feel this inference is sufficiently strong to create a substantial doubt on the narrow question of the intent behind the travel in question.

For the foregoing reasons, judgment of acquittal must be granted as to Count V, but denied as to Counts II through IV.

The sufficiency of the evidence to prove a scheme to defraud within the purview of the Mail Fraud Statute is a substantial one. The Court is of the opinion that the evidence was sufficient to submit this issue to the jury under the reasonable doubt standard.

As to the jurisdictional elements of the mail fraud

counts (VI through XIII), with the exception of Count VII, the only point that concerns the Court is the question of whether the particular mailings are reasonably viewed as an integral part of or in furtherance of the alleged scheme. The Court has no doubt that Counts VI, IX and XIII were proven beyond a reasonable doubt.

As to Count VII, there is a question whether a mailing of the check in question was ever proved. The bank officer testified that the check's deposit was duly listed on the bank's mail register; however, he also testified that he had recently learned that this register is sometimes used to record deposits from the night depository that were not received by mail. Tr. 2071-72, 2077. Kerner testified that he recalled receiving and endorsing this check but could not recall the manner in which it was deposited. He further testified that he was probably in Springfield on the days before and after the date of deposit. Tr. 6619-21. This proof is insufficient to show whether the alleged use of the mails ever occurred when measured by the reasonable doubt standard. See *United States* v. *Brickley,* 426 F.2d 680, 684 (C.A. 8, 1970); *United States* v. *Doran,* 299 F.2d 511, 514 (C.A. 7, 1962).

The mailing charged in Count VIII was made by the Antioch Savings and Loan of a bulk shipment of checks, one of which was a check deposited by Kerner in his account with Antioch, to the American National Bank for deposit in Antioch's account with the American National. There was proof that this check constituted the proceeds of bribery. Since payment by check does not become final until it is paid by the drawee bank, this mailing was part of the collection process and, as such,

reasonably could be foreseen and viewed as an integral part of the alleged bribery scheme. See *United States v. Chason*, 451 F.2d 301, 303 (C.A. 2, 1971).

The mailing charged in Count X was by the Standard Bank of a bank statement of account and cancelled checks to one of its depositors, George Schaller. One of the cancelled checks was payable to defendant Isaacs, and, according to the proof, represented the proceeds of bribery. Since this mailing was subsequent to final payment in the collection process, in the opinion of the Court it was too remote from the alleged bribery scheme reasonably to be viewed as a integral part of the scheme or as in furtherance of said scheme.

Counts XI an XII involve mailings of bank statements and cancelled checks on accounts of Kerner and Isaacs, respectively, by a bank. These accounts were opened with this bank by the non-mail deposit of funds representing the proceeds of the alleged bribery. In the opinion of the Court, the mailings on which these counts are based cannot reasonably be viewed as having been an integral part of the alleged scheme or in furtherance of it. The mailings, thus, are too remote from the scheme to support the charges.

Accordingly, judgment of acquittal must be granted as to Counts VII, X, XI and XII, and denied as to Counts VI, VIII, IX, and XIII.

Kerner claims that the Court's greatest error was its submission of the perjury count (XIV) to the jury. In his post-trial memorandum, Kerner has raised a new ground for holding the perjury count duplicitous, that is, the assertion that there is a distinction between the question of whether Kerner ever attempted to influence racing dates and the question of whether he ever had

conversations concerning the changing of racing dates. In the opinion of the Court, in the context of grand jury testimony in question, this distinction is too subtle to support a claim of duplicity. We previously overruled a pre-trial motion to dismiss the count on the ground of purported duplicity. See *United States* v. *Isaacs*, 347 F.Supp. 743, 755 (N.D.Ill., 1972). The question of conversations is subsidiary to the basis question whether Kerner attempted to influence racing dates.

Bronston v. *United States*, ... U.S. ..... (1973) is not in point since we did not face the problem of false negative implications.

Kerner raises for the first time in his post-trial motions the question of the constitutionality of the abolition of the two-witness rule to sustain a charge of perjury. In the opinion of the Court, this is a legislative, not a constitutional problem. See *United States* v. *McGinnis*, 344 F.Supp. 89, 92 (S.D.Tex., 1972); *United States* v. *Clizer*, 464 F.2d 121, 123 (C.A. 9, 1972). Additionally, the Government presented two witnesses whose testimony contradicted the grand jury testimony that was the subject-matter of Count XIV. A third witness, called by the defense, when cross-examined, gave further substantive support to the charge. Tr. 6004-06.

The questions of whether the proof of a violation of 18 U.S.C. Sec. 1001 was sufficient to sustain a conviction or whether the indictment stated an offense against the United States are serious ones. As to the factual question, we believe that the evidence was sufficient for the jury to find guilt beyond a reasonable doubt. We also believe that our ruling on the motion to dismiss is supported by the cases. See *United States* v. *Isaacs*, 347 F.Supp. 743, 755-56, (N.D.Ill., 1972).

Kerner concedes that the income tax evasion charge "necessarily stands or falls with the charge of bribery," but contends that the proof of bribery was contrary to the weight of the evidence. (Defendant's Brief, p. 39). In the opinion of the Court the proof was sufficient to sustain a conviction on income tax evasion; Illinois bribery law is not particulary "subtle [or] sophisticated" (See Defendant's Brief, p. 51); and our instructions on bribery in our opinion were both correct and adequate.[1]

The claim of error on the ground that the Court refused Kerner's motion for severance based on *United States* v. *Echeles*, 352 F.2d 892 (C.A. 7, 1965), is without merit. In *Echeles*, the exculpatory statements of the co-defendant were made on the record and under oath at an earlier trial which was the basis for the subsequent subornation of perjury charge against Echeles. To grant a severance under our circumstances would destroy the use of joint trials as provided under the rules of criminal procedure. See *United States* v. *Johnson*, 426 F.2d 1112,

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[1]The Illinois bribery statute does not require as an essential element any action in response to the bribe. Kerner argues that there would have been no basis for a charge of bribery had the CTE purchase been consummated in 1962 instead of 1966. This argument ignores proof that the only people who purchased CTE shares at the issue price of $1,000 per share were certain directors who rendered valuable services in connection with the reorganization and defendants Isaacs and Kerner. (Ex. 504A; 12-28-62-2) It also ignores the proof that at about the same time the November, 1962 buy-sell agreement was made, CTE stock was sold for $2,500 per share to Modie Spiegel. (Ex. 504A; 11-2-62)

1116 (C.A. 7, 1970); *United States* v. *Kahn*, 381 F.2d 824, 841 (C.A. 7), *cert. den.* 389 U.S. 1015 (1967).

Kerner complains of the Court's refusal to read him its charge prior to instructing the jury. He contends that this action "was at variance with accepted practice and denied counsel a fair opportunity to object to the charge as given." His contention is founded on an erroneous statement of fact. This Court does not recall ever hearing of any federal judge following such a practice. We were informed that only one of the fifteen district judges in Chicago, Judge Campbell, advocates this procedure. This Court has never provided counsel with its charge in advance. In this case, the Court worked on and made changes in the charge through the day before it was delivered. Counsel was advised of the substance of the charge more than three days before it was delivered through the Court's action of the 405 jury instructions proposed by counsel. Our action is consistent with Rule 30, F.R.Cr.P.

Kerner contends that certain testimony by Miller apparently concerning Mrs. Everett's state of mind in making the stock offer is incompetent. The Government responds that this testimony was in answer to the question, "Why did you relay Mrs. Everett's offer of stock to Governor Kerner and Mr. Isaacs?" (Tr. 2952) It contends that the question and answer relate only to Miller's own intent and, as such, is both relevant and competent. Even if viewed as opinion testimony as to Mrs. Everett's state of mind, the testimony had a solid foundation in the totality of Mrs. Everett and Miller's combined testimony to permit the jury to weigh its credibility. In the Court's opinion its admission was not prejudicial error, if error at all.

The questions to former racing board members as to how they would have voted had they known the Governor was a shareholder in an applicant for racing dates are not impermissible hypothetical questions but go to the factors considered by the former board member in determining his vote, that is, to his state of mind. A person is competent to testify to this own state of mind. see also *Bettman* v. *United States*, 224 F. 819, 830 (C.A. 6, 1915).

If any mistake was made in stating the theory of Kerner, the responsibility rests with counsel for their failure to present an adequate statement of his theory as provided for in the First Pre-trial Order and Stipulation or for their failure to advise the Court of the error.[2] The extremely general nature of proffered statement of Kerner's theory compelled the Court to extract his theory from his counsel's opening statement the jury.

Some of the instructions given the jruy that Kerner contends were error involve questions of law that are not settled; a few are deemed as frivolous. As to Kerner's proposed instructions which he contends the Court erroneously refused to charge, these too involved questions of law. The Court gave careful consideration to all proposed jury instructions, and is of the opinion that it did not commit prejudicial error in its rulings thereon. As to purported error II.D (2) (b), the Court instructed the jury that campaign contributions were not illegal by themselves. Tr. 7454.

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[2]Counsel was permitted to submit revised instructions of any asserted errors in the statement of its theory after the Court instructed the jury.

Counsel on both sides and the Court advised the jury that statements of counsel are not evidence and if any such statements contradict the evidence the jury shall disregard the same. See, e.g., Tr. 1217.

The closing argument of government counsel that the personal integrity of the United States Attorney was in issue was proper in light in the defense claim that the indictment was ". . . the product of a very busy imagination of a very vigorous and ambitious prosecutor . . . The attempt to torture the facts into criminal charges is manufactured, unjustified, unreasonable and not in good faith." Tr. 1305. See *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (C.A. 6, 1965).

For the indicated reasons, it is Ordered that the motion for a judgment of acquittal be, and the same hereby is, granted as to Counts V, VII, X, XI and XII, and denied as to the other counts. It is further Ordered that the motion for a new trial be, and the same hereby is, denied.

/s/ Robert L. Taylor
United States District Judge

RELEVANT UNITED STATES CONSTITUTIONAL PROVISIONS

United States Const. Art. I (3) (7):

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

United States Const. Art. II (4):

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

United States Const. Art. III (1):

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Court as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1001. Statements or entries generally.

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341. Frauds and swindles.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spur-

ious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

18 U.S.C. § 1623. False declarations before grand jury or court.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceedings before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not susbtantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91-452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

RELEVANT UNITED STATES RULES

Rule 14 of the Federal Rules of Criminal Procedure:

RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

As amended Feb. 28, 1966, eff. July 1, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1650

OTTO KERNER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1651

THEODORE J. ISAACS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–64a)[1] and the order and opinion denying the petitions for rehearing (Pet. App. 65a–72a) are not yet reported. The three opinions of the district court (Pet.

[1] "Pet. App." refers to the separate appendix filed jointly by the petitioners in this Court.

App. 73a–124a) are reported at 347 F. Supp. 743, 347 F. Supp. 763, and 364 F. Supp. 895.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1974. A petition for rehearing was denied on March 28, 1974. By orders of April 3, 1974 (in No. 73–1650), and April 19, 1974 (in No. 73–1651), Mr. Justice Rehnquist extended the time for filing the petitions for writs of certiorari to and including May 6, 1974. The petition in No. 73–1650 was filed on May 4, 1974, and that in No. 73–1651 on May 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Kerner, a federal court of appeals judge, was properly subjected to indictment and trial prior to his removal from office.

2. Whether the mailings proved at trial were in furtherance of a "scheme or artifice to defraud" within the meaning of 18 U.S.C. 1341.

3. Whether a conviction of conspiracy (1) to travel in interstate commerce, to use facilities in interstate commerce, and to use the United States mail with intent to distribute the proceeds of bribery and (2) knowingly and willfully to use the United States mail in furtherance of a scheme to defraud may be sustained on the facts of this case where the court of appeals reversed convictions on substantive Travel Act counts for failure to show travel or use of facilities in interstate commerce but sustained convictions on substantive mail fraud counts.

4. Whether counts of the indictment charging perjury and false statements were properly joined with counts charging conspiracy, mail fraud, and use of interstate facilities in furtherance of bribery.

5. Whether petitioners were entitled to separate trials.

6. Whether false statements made by petitioner Kerner to Internal Revenue Service agents during the course of their criminal investigation of his income tax returns violated 18 U.S.C. 1001.

7. Whether the specially appointed panel below was required to follow decisions reached by the Seventh Circuit subsequent to its appointment.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The relevant constitutional provisions, statutes, and rule are set forth at Pet. App. 125a–131a.

STATEMENT

After a joint trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on numerous charges arising out of a scheme to accept bribes while petitioner Kerner was serving as Governor of Illinois and petitioner Isaacs was Director of the State Department of Revenue.[2] Both petitioners were convicted of conspiracy (18 U.S.C. 371), use of interstate facilities in furtherance of bribery (18 U.S.C. 1952), use of the mails in furtherance of a fraudulent scheme (18 U.S.C. 1341),

[2] Three other persons were charged in the indictment. One, Joseph Knight, was severed due to illness and died after the trial. Two others, William S. Miller and Faith McInturf, were granted immunity. With Marjorie Everett, an unindicted co-conspirator, Miller was a principal prosecution witness.

tax evasion (26 U.S.C. 7201), and filing false tax returns (26 U.S.C. 7206(1)). Kerner was also convicted of perjury before a grand jury (18 U.S.C. 1623) and of making false statements to agents of the Internal Revenue Service (18 U.S.C. 1001). Both petitioners were sentenced to concurrent terms of three years' imprisonment on each count and fined $10,000 on each of five counts. The court of appeals reversed the convictions on three counts under the Travel Act (18 U.S.C. 1952) and affirmed the convictions on the remaining counts of the indictment (Pet. App. 1a–65a).

The following summary of the events leading to this prosecution is taken from the opinion of the court of appeals (Pet. App. 3a–17a).

1. In 1960, when Kerner was the Democratic candidate for Governor of Illinois, Mrs. Marjorie Everett's racing enterprises contributed to his campaign through her associate, William Miller. Miller collected the money and gave it to Isaacs, who was Kerner's campaign manager. After his election, Kerner appointed Isaacs Director of the Department of Revenue and Miller Chairman of the Illinois Racing Board. At Isaacs' invitation, Miller submitted the names of persons whom Mrs. Everett had recommended for appointment to the Racing Board, and petitioner Kerner followed those recommendations in appointing members to the Board.

In 1961, Miller sought legislation that would permit Mrs. Everett, who already controlled two horse-racing tracks through her ownership of Chicago Thoroughbred Enterprises (CTE), to add a harness-racing corporation to her business enterprises. Such a law

was passed, and Kerner signed it. Mrs. Everett then organized Washington Park Trotting Association (WPTA) and Chicago Harness Racing, Inc. (CHR), both of which used the CTE facilities. Shares in the former were issued to nominees in favor of various legislators; CHR common shares were placed in a voting trust, and 50,000 shares were retained for distribution to persons who could help the company.

Miller and Mrs. Everett decided to make stock available to Kerner and Isaacs in order to ensure the award of favorable racing dates and other beneficial treatment. Accordingly, on November 8, 1962, Mrs. Everett wrote to Miller to confirm that she would sell 10,000 shares of WPTA common stock (at one dollar per share) and 25 shares of CTE common stock (at $1,000 per share) to Kerner and a smaller number of shares in the same companies at the same prices to Isaacs. Those prices were considerably below actual market value. On the following day Miller conveyed Mrs. Everett's offer to Kerner and Isaacs, and they accepted it. Thereafter, Isaacs repeatedly pressed Miller for delivery of the shares.

In the spring of 1964, when Kerner, in his capacity as governor, was awarding harness-racing dates, Miller advised him that Maywood Park Trotting Association, one of Mrs. Everett's competitors, was conducting its business fraudulently. Kerner contacted Thomas Bradley, then Chairman of the Harness Racing Commission, and told him that Maywood was insolvent and was being run by "wrong people." Bradley disputed these allegations, but Kerner nevertheless ordered him to cancel Maywood's autumn racing dates and reassign them to two other racing associations,

one of which was controlled by Mrs. Everett. Bradley refused to do so and held hearings at which substantial evidence supporting Maywood was submitted. Kerner, however, refused to meet with Bradley to discuss the matter and instead requested Bradley's resignation.

2. In 1964, after Kerner was re-elected, the allocation of racing dates was again in issue. Egyptian Trotting Association, which rented CTE facilities, had been tentatively assigned some desirable fall racing dates. After hearing rumors that the dates might be awarded to Maywood instead, Egyptian's director, Clyde Lee, met with Kerner to discuss the assignments. Kerner acknowledged that he personally would make the assignment, but he offered Lee no assurance of what his decision would be. Lee then discussed the matter with Mrs. Everett, who contacted James Hayes, one of the racing commissioners, and expressed her desire that Egyptian retain its fall dates. The dates were nevertheless awarded to Maywood, but Egyptian was awarded six additional racing dates.

3. In 1965, Illinois racing interests, including Mrs. Everett, were disturbed by prospective legislation that would have increased the state's revenues from thoroughbred and harness racing at the expense of the track operators. Clyde Lee met with Kerner, another state official, and Mrs. Everett's attorney. Mrs. Everett's accountants had prepared documents to show the detrimental effect of the legislation on certain harness-racing enterprises. Kerner agreed to consider the matter and, shortly thereafter, met with Issacs and Miller. They agreed to sponsor a proposal that was

more favorable to the track operators; that proposal was passed by the State legislature and signed into law by Kerner.

In August 1965, Kerner also signed a law abolishing the Harness Racing Commission and expanding the Racing Board. Miller was appointed chairman of the Board, and all but one of the new appointees were recommended to Kerner by Miller after discussions with Isaacs and Mrs. Everett.

4. In January 1966, Isaacs complained to Miller that he and "the old man" were impatient to receive the CTE stock promised by Mrs. Everett. Mrs. Everett then made 50 shares available. The purchase was facilitated by means of a $40,000 "loan" arranged by Miller. Joseph Knight, then the State Director of Financial Institutions, deposited the $40,000 check and drew another check in the same amount payable to Isaacs. Isaacs then deposited this check, together with a $5,000 check from Kerner payable to "cash," and typed "Repayment to TJI of advance payment of 25 CTE, balance owing to TJI is $20,000 plus interest at 5% from July 15, 1966" on the deposit slip.

On August 10, 1966, delivery of the shares to Isaacs was made by an attorney for Mrs. Everett's corporation. Isaacs tendered two checks drawn on his personal account and payable to Mrs. Everett—one for $50,000 and one for "interest" in the amount of $8,958. He also presented a promissory note backdated to November 12, 1962, promising to pay $50,000 at 5% interest, with the 50 shares pledged as security. Mrs. Everett's attorney cancelled the note and returned it to Isaacs and gave the CTE certificates to Miller. The

shares were worth $300,000 at the time of this transaction.

At the request of Miller and Isaacs, Mrs. Everett sent Isaacs a letter backdated to November 12, 1962, confirming the purchase of 50 shares of CTE at $1,000 per share and stating that she would hold the shares as collateral for Isaacs' $50,000 note, due on or before November 15, 1966, with interest at 5%. The "interest" paid by Isaacs at the August 10 meeting was not, in fact, due and was intended merely to corroborate the authenticity of the backdated note. In 1967, Kerner sent an IRS Form 1099 by mail to Mrs. Everett, reporting his share of the "interest" payment. (This mailing constituted the basis for the mail fraud charged in Count VI of the indictment.)

In the meantime, Knight deposited $11,200 (for which he was later reimbursed by Kerner and Isaacs) in Miller's account at the brokerage house of Sincere & Co. as payment for the 28,000 shares of CHR which had been allocated to Kerner and Isaacs. Two 14,000-share certificates were transferred to Knight's name. Mrs. Everett's attorney, George Schaller, subsequently agreed to act as nominee on behalf of the beneficial owners.

In the autumn of 1966, when CHR and CTE applied for their 1967 racing dates, the application listed Mrs. Everett as the owner of 2,000 shares of CTE and Schaller as the owner of 38,000 shares of CHR. The applications thus violated a regulation which required disclosure of dummy holdings and identification of the beneficial owners, since Kerner and Isaacs were each the beneficial owners of 25 of the CTE shares reported

by Mrs. Everett and 14,000 of the CHR shares reported by Schaller.

In early 1967, CHR declared a 20 cent per share dividend. Knight requested that Schaller pay the dividends "to the true owners [of the stock], whose identity I have disclosed to you orally." At Isaacs' request, Schaller then deposited the dividend checks in his account and wrote two personal checks, each in the amount of $2,800, payable to Kerner and Isaacs, respectively. (The mailing of the personal checks constituted the basis for the mail fraud charged in Count IX.)

In April 1967, Miller arranged for the purchase of the 28,000 CHR shares held by Kerner and Isaacs. Isaacs consented to the sale, and the purchaser drafted two checks payable to Schaller, each in the amount of $28,000. Schaller deposited these checks and wrote two others in the same amounts, payable to Knight. Isaacs delivered those checks to Knight, who deposited them in his account. Knight then wrote two checks, each for $7,000, payable to Kerner and Isaacs, respectively, and a check for $41,642.48 to repay the $40,000 "loan" which had been used in the purchase of the CTE stock. Knight then mailed one of the $7,000 checks to Kerner. (The mailing of Knight's check to Kerner formed the basis for the mail fraud charged in Count VIII.)

In May 1967, Isaacs and Kerner exchanged their CTE shares for 10,000 Balmoral Jockey Club (BJC) shares held by Mrs. Everett, so that she could return the CTE shares to the bank that had been holding them as collateral. The exchange was effected by

transferring the BJC shares to Knight, who acted as nominee. In June 1967, Miller acquired control of BJC. The application he filed on behalf of BJC for 1968 racing dates failed to disclose the beneficial interests of Kerner and Isaacs. The requested racing dates were granted, and a letter and form confirming that fact was mailed by the Board to BJC. (This mailing constituted the basis of the mail fraud charged in Count XIII.)

Subsequently, Miller bought the BJC shares owned by Kerner and Isaacs. To effect the purchase, Miller drafted a check for $300,000, payable to Knight. Knight endorsed the check in blank and delivered it to Isaacs. Isaacs arranged for a bank for which he performed legal services to negotiate the check without further endorsement (contrary to normal bank procedures). Isaacs opened a checking account for Kerner and savings accounts for himself and Kerner and deposited $15,000 in each savings account, $135,000 in Kerner's checking account and $135,000 in his own checking account. The net result of these transactions was the payment to Kerner and Isaacs of nearly $160,000 in return for payments by them of only $15,079 each.

5. On his 1967 federal income tax return, Isaacs reported the purchase of 14,000 shares of "Chicago Co." in 1966 for $5,600 and their sale a year later for $28,000. He also reported a 1967 sale for $150,000 of 25 shares of "Bajo Co." acquired in 1962 for $25,000. In his 1967 return, Kerner reported a "Chicago Co." transaction identical to that listed in Isaacs' return and a sale for $150,000 of 5,000 shares of "Balmoral,"

acquired in exchange for 25 shares of "C.T. Co." stock purchased for $25,000 in 1962. These "sales" were treated by both Kerner and Isaacs as giving rise to long-term capital gains. The government charged, however, and the jury found, that these items actually referred to the CTE and CHR stock that had been received as bribes in 1966 and were taxable as ordinary income for that earlier year. (Counts XVI and XVIII of the indictment charged Kerner and Isaacs, respectively, with income tax evasion. Counts XVII and XIX charged the making of false statements on the tax returns.)

In July 1970, two IRS special agents visited Kerner, who by that time was a judge of the United States Court of Appeals for the Seventh Circuit. After being advised of his rights, Kerner was asked to identify the "Chicago Co." listed on his 1967 return. Kerner denied that the item referred to CHR and instead falsely claimed that "Chicago Co." refered to a financial institution, that a named friend was an officer of that corporation, and that the stock had been purchased on a broker's recommendation. (These statements were the basis for Count XV, charging Kerner with making false statements in violation of 18 U.S.C. 1001.)

In 1971, Kerner requested an appearance before a federal grand jury investigating Illinois racing operations. During his testimony he denied that he had ordered Bradley to reassign Maywood's 1964 racing dates or that he had discussed the Egyptian Trotting Association racing dates with Clyde Lee. (Count XIV,

charging Kerner with perjury, was based upon those denials.)

6. Both Kerner and Isaacs presented evidence at trial, and Kerner testified in his own behalf. Isaacs did not take the stand.

ARGUMENT

1. Petitioner Kerner contends (Kerner Pet. 6-9) that his conviction effectively deprived him of his judicial power and therefore operated to remove him from the office of federal judge in a manner not authorized by the Constitution. He argues that he is not subject to criminal prosecution until he has been impeached by the House of Representatives and convicted by the Senate. This argument fails for two independent reasons.

a. First, there is no constitutional bar to the criminal prosecution of a federal judge. Although Article I, Section 6 of the Constitution grants members of Congress an express, if limited, immunity from arrest, the Constitution contains no similar grant of immunity, either from arrest or prosecution, for judges. Petitioner perforce relies on the final clause of Article I, Section 3, Clause 7, which provides that "the Party convicted [on impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." But the sole purpose of that caveat is to ensure that the Double Jeopardy Clause may not be invoked as a bar to criminal proceedings following removal from office by impeachment; it was not intended to, and does not by its terms, confer upon judges any immunity from prosecution prior to impeachment.

Historical practice and commentary support this view. The first Congress, many of whose members had been delegates to the Constitutional Convention, enacted Section 21 of the Act of April 30, 1790, 1 Stat. 117, recognizing that sitting federal judges were criminally punishable for bribery and providing for their disqualification from office upon conviction. In 1796 Attorney General Lee informed Congress that a judge of a territorial court, a civil officer subject to impeachment, was indictable for criminal offenses while in office. 3 Hinds, *Precedents of the House of Representatives* 982–983 (1907). In this century, two sitting federal judges (other than petitioner) have been indicted and tried while in office. See Borkin, *The Corrupt Judge* 95–186 (1962). And constitutional scholars have long agreed, with virtual unanimity, that "the ordinary tribunals * * * are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." Rawle, *A View of the Constitution of the United States,* 215 (2d ed., 1829). See, *e.g.,* 1 Curtis, *Constitutional History of the United States* 481–482 (1889); Simpson, *A Treatise on Federal Impeachments* 52–53 (1916); Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions,* 39 Fordham L. Rev. 1, 55 (1970).

Moreover, there is no merit to petitioner's suggestion that conviction of a crime is constitutionally equivalent to removal from office. As this Court noted in connection with the criminal prosecution of a Senator, "the final judgment of conviction [does] not operate, *ipso facto,* to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him

as expelled by force alone of the judgment." *Burton* v. *United States*, 202 U.S. 344, 369. Whether the criminal conviction of a federal judge will lead to his removal by impeachment rests upon the sound judgment and discretion of the Congress. See Simpson, *supra*, at 52. Thus even those who insist most ardently that impeachment is the sole constitutional method of removing a federal judge from office nevertheless agree that "judges, like other people, can be tried, convicted, and punished for crimes * * *." *Chandler* v. *Judicial Council*, 398 U.S. 74, 141–142 (dissenting opinion of Mr. Justice Black).

b. Second, since petitioner Kerner failed to raise his office as a defense at trial, he is precluded from doing so on appeal. Fed. R. Crim. P. 12(b)(2). Cf. *Davis* v. *United States*, 411 U.S. 233. The court of appeals (by a vote of 2 to 1) resolved this question of waiver in petitioner's favor (Pet. App. 18a–20, 63a). The court of appeals, relying upon *Glidden Co.* v. *Zdanok*, 370 U.S. 530, apparently reasoned that a nonfrivolous constitutional claim relating to the power of the court to act necessarily concerns subject-matter jurisdiction. But this Court's holding in *Zdanok*—that the question whether an appellate court was properly constituted may be raised for the first time upon review of that court's decision—has no application here. Petitioner's claim has nothing to do with the trial court's general power to act; nor does it challenge the court's general subject-matter jurisdiction over federal crimes. Petitioner's claim is merely one of a personal immunity and that is a matter of personal jurisdiction that is waived if not raised at trial, as it was not here.

2. Petitioners contend (Kerner Pet. 9–12; Isaacs Pet. 29–33) that the bribery scheme here did not amount to a "scheme or artifice to defraud" within the meaning of the mail fraud statute, 18 U.S.C. 1341, and (Kerner Pet. 16–17) that the mailings here were not in any event in furtherance of that scheme.

a. Petitioners' statutory claim is that the mail fraud statute does not reach bribery schemes that defraud a State and its citizens of the honest services of their public officials. Petitioners complain that federal punishment of state officials for bribery is an unwarranted intrusion by the federal government into state affairs. But "Congress may forbid any mailing in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme itself or not." *United States* v. *Edwards*, 458 F. 2d 875, 880 (C.A. 5), certiorari denied *sub nom. Huie* v. *United States*, 409 U.S. 891. And since the purpose of the statute was to ensure the integrity of the national postal system by denying its facilities for use in any fraudulent plan (*Parr* v. *United States*, 363 U.S. 370, 389), mailings in furtherance of state bribery schemes are within its intended prohibition.

Petitioners argue that the statutory language, "scheme or artifice to defraud," covers only schemes involving tangible loss to victims. But it is well understood that no proof of tangible loss is required for conviction. *Shale* v. *United States*, 388 F. 2d 616, 618 (C.A. 5), certiorari denied, 393 U.S. 984; *United States* v. *George*, 477 F. 2d 508, 512 (C.A. 7), certiorari denied *sub nom. Yonan* v. *United States*, 414 U.S. 827. "Using a fiduciary position to obtain secret

profits is not only a breach of trust but an active fraud, and such conduct is condemned by the mail fraud statute if the mail is used in furtherance of the execution of said scheme." *United States* v. *Hoffa*, 205 F. Supp. 710, 716 (S.D. Fla.). See also, *Bradford* v. *United States*, 129 F. 2d 274, 276 (C.A. 5), certiorari denied, 317 U.S. 683; *United States* v. *Dorfman*, 335 F. Supp. 675 (S.D. N.Y.), affirmed on other grounds, 470 F. 2d 246 (C.A. 2); *United States* v. *Faser*, 303 F. Supp. 380 (E.D. La.).[3] In particular, it has long been understood that a scheme contemplating bribery of a public official is a scheme to defraud. *Shushan* v. *United States*, 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574. There was, in any event, tangible loss here. The citizens of Illinois were deprived not only of the honest service of their public officials but also of the additional state revenues that would have been received if legislation favoring track operators had not been enacted; and the innocent racing associations in the State were deprived of the additional

[3] Nothing in *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), on which petitioners rely, is to the contrary. The indictment there charged a scheme by corporate officers to sell supplies to their corporation at inflated prices, and the convictions were reversed because the government's proof showed that the prices were in fact at or below market. The court of appeals refused to sustain the conviction on a "breach of trust" theory that had not been presented by the prosecution at trial; moreover, it believed that a breach of trust would not amount to active fraud where the self-dealing violated no law or corporate charter. That decision obviously does not support petitioners here, who were tried on a theory of breach of trust with respect to acts that were criminal offenses under state law.

profits that might have accrued from an impartial assignment of racing dates.[4]

b. Petitioner Kerner relies upon *United States* v. *Maze*, No. 72–1168, decided January 8, 1974, in asserting that the mailings here were not in furtherance of the bribery scheme. But the relationship of the mailings to the effectuation of the scheme is far closer than in *Maze*. This Court summarized the critical facts in *Maze* as follows (slip. op. at p. 7):

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims utlimately [*sic*] bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.

In contrast, the mailings here were critical to the success of the scheme, which depended for its full effectuation on concealment of petitioners' beneficial ownership of the stock that had been conveyed as a bribe and on conversion of those stock interests into cash in a clandestine manner. Petitioner Kerner's mailing of the IRS Form 1099 to Mrs. Everett purporting to show the payment of accrued interest (Count VI)

[4] It is irrelevant that petitioners were not solely responsible for the enactment of the legislation or the assignment of racing dates. "The fact that the official who is bribed is only one of several and could not award the contract by himself does not change the character of the scheme where he is expected to have influence enough to secure the end in view." *Shushan* v. *United States*, *supra*, 117 F. 2d at 115. See also *Bradford* v. *United States*, *supra*, 129 F. 2d at 276.

was part of a continuing scheme to conceal the fact that the stock had been received as a bribe rather than by purchase; Schaller's deposit of the dividend checks into his account and his mailing of personal checks to petitioners (Count IX) accomplished the transfer of cash to petitioners in a manner that would conceal their ownership interests in the racing enterprises; similarly, Knight's deposit of another of Schaller's checks into his own account and his subsequent mailing of substituted personal checks to petitioners (Count VIII) also resulted in their being paid off in secret; finally, the mailing of confirmation of racing dates to BJC on the basis of its false application (Count XIII) was a necessary link in the chain of events that permitted Mrs. Everett's company to profit from the bribery without disclosing petitioners' illegally obtained interests.

3. Count I of the indictment alleged a conspiracy "a. to travel in interstate commerce, to use facilities in interstate commerce, * * * and to use the United States mail, with intent to distribute the proceeds of bribery * * *; and b. to knowingly and wilfully use the United States mails and to cause the United States mails to be used in furtherance of a scheme to defraud" (J. App. 5a).[5] Petitioners contend here (Kerner Pet. 12–16; Isaacs Pet. 34–37) that, since the court of appeals reversed their substantive convictions under the Travel Act, they cannot logically be held guilty of

[5] "J. App." refers to the Joint Appendix in the court of appeals.

the conspiracy so alleged.[6] This contention is without merit.

It is settled that a single count of an indictment may allege a conspiracy to violate two or more statutes (*Frohwerk* v. *United States*, 249 U.S. 204) and that proof of any one of the alleged illegal objects of the conspiracy will support a conviction for the conspiracy. *United States* v. *Grizaffi*, 471 F. 2d 69 (C.A. 7), certiorari denied, 411 U.S. 964; *United States* v. *Goodwin*, 455 F. 2d 710, 713–714 (C.A. 10), certiorari denied, 409 U.S. 859; *Andrews* v. *United States*, 108 F. 2d 511, 515 (C.A. 4). In this case, Count I charged a conspiracy to violate both the Travel Act and the mail fraud statute, and the government presented ample evidence to show that petitioners devised a scheme to defraud the State of Illinois, its citizens, and its racing associations, and that the mails were knowingly caused to be used in furtherance of the scheme. And since the jury convicted petitioners of the substantive offense of mail fraud, this is not a case where the reviewing court has "no way of knowing" (*Yates* v. *United States*, 354 U.S. 298, 311) whether the jury found sufficient overt acts to support a proper conviction for conspiracy.[7] Thus petitioners' convictions

[6] In making this argument, petitioners attempt to raise the issue currently before the Court in *United States* v. *Feola*, No. 73–1123, certiorari granted April 15, 1974, *i.e.*, whether the conspirators' knowledge of the federal jurisdictional element must be separately proven in a federal conspiracy prosecution.

[7] Moreover, the jury was instructed that to find a conspiracy to use the mails in furtherance of a scheme to defraud it must find, *inter alia*, that use of the mails was either contemplated by the conspirators or reasonably foreseeable (Tr. 7457–7461). Thus the issue presented by *United States* v. *Feola*, *supra*, does not arise at all in this case.

for conspiracy are sustainable notwithstanding the reversal of their convictions on the substantive Travel Act counts.

4. Petitioner Kerner contends (Kerner Pet. 18–20) that he was prejudiced by the joinder of the count charging him with perjury before the grand jury with the other counts of the indictment. As petitioner Isaacs points out (Isaacs Pet. 21–24), the accepted test for joinder of offenses in multiple defendant trials is provided by Rule 8(b), Fed. R. Crim. P., which permits joinder of offenses committed in the same series of acts or transactions. See 1 Wright, *Federal Practice and Procedure: Criminal* 313, 318–319 (1969). Joinder of the perjury charge with the other charges was proper under that test. As the court of appeals stated (Pet. App. 50a):

> The perjury and other offenses with which we are concerned have a logical relationship. They are all connected with, or arose out of, a common plan to corruptly influence the regulation of horse racing. The perjury charge against Kerner related to his involvement with the racing industry, and evidence of that involvement was pertinent to the proof of the other offenses.

In short, the perjury and the other charged offenses arose from a common "series of acts or transactions" involving a scheme by public officials to perform favors for Mrs. Everett's racing interests in return for illegal bribes, and therefore were properly joined under Rule 8(b).

The district court properly denied petitioner Kerner's motion under Rule 14, Fed. R. Crim. P., for

separate trial of the perjury count. Proof of the perjury count required substantially the same evidence as was required to establish petitioner Kerner's guilt on the conspiracy and mail fraud counts, and separate trials would therefore have involved substantial duplication in the presentation of witnesses and evidence. Moreover, petitioner Kerner suffered no cognizable prejudice from joinder of the perjury count, since evidence of the perjury would in any event have been admissible at a separate trial of the conspiracy and mail fraud counts as a false exculpatory statement tending to show consciousness of guilt. See *United States* v. *Carson*, 464 F. 2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949; *United States* v. *Sweig*, 441 F. 2d 114, 118–119 (C.A. 2), certiorari denied, 403 U.S. 932.

Petitioner Kerner relies on *United States* v. *Pacente*, 490 F. 2d 661 (C.A. 7), petition for rehearing *en banc* granted February 19, 1974. In that case, another panel of the Seventh Circuit held that a count charging perjury before the grand jury should not be joined with other counts because the perjury charge impeaches the defendant before the petit jury. But the perjury charge here was little different in that respect from the other charges against petitioners, all of which involved some form of deceitful, dishonest conduct. *Pacente* involved joinder of a perjury charge with non-deceitful conduct—interference with commerce by threats or violence—and therefore is distinguishable. But we further agree with the court of appeals below that "the holding in [*Pacente*] is bad law," for it would lead to repetitive trials involving duplicative

witnesses and evidence, and would thereby impose a severe strain on judicial, prosecutorial, and defense resources.

5. Both petitioners contend that they were entitled to separate trials.

a. Petitioner Kerner claims (Kerner Pet. 20–23) that he was prejudiced by denial of a severance. That claim rests upon the unsupported assumption that Isaacs, who refused to testify at their joint trial, would have furnished exculpatory testimony at a separate trial of Kerner alone. But Isaacs never indicated that he possessed evidence that would exculpate Kerner, nor did he ever intimate that he would be willing to waive his Fifth Amendment privilege in order to testify in a separate trial of Kerner. A defendant is not entitled to a severance on the bare possibility that a co-defendant's testimony will be available to him if and only if they are separately tried. *United States* v. *Johnson*, 426 F. 2d 1112, 1116 (C.A. 7), certiorari denied, 400 U.S. 842.[8] In short, petitioner Kerner's claim here is based on nothing more than mere speculation that a severance might have aided his defense. Such speculation is insufficient to show an abuse of the trial judge's discretion in refusing severance. *United States* v. *Blue*, 440 F. 2d 300, 302 (C.A. 7), certiorari denied, 404 U.S. 836; *Gorin* v. *United*

[8] Petitioner Kerner relies on *United States* v. *Shuford*, 454 F. 2d 772 (C.A. 4), and *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7). But in those cases the co-defendants had represented to the court, at the time of the motion for severance, that they would be willing to testify in favor of the defendant seeking severance if he were tried separately. There was no such representation here.

States, 313 F. 2d 641, 645–646 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Caci*, 401 F. 2d 664 (C.A. 2), certiorari denied, 394 U.S. 917; *United States* v. *Kilgore*, 403 F. 2d 627 (C.A. 4), certiorari denied, 394 U.S. 932; *Kolod* v. *United States*, 371 F. 2d 983, 990–992 (C.A. 10). This is particularly so where, as here, severance would have required duplication of a lengthy and complex trial. *United States* v. *Davis*, 418 F. 2d 59, 61 (C.A. 9).[9]

b. Petitioner Isaacs claims (Isaacs Pet. 21–28) that his defense was prejudiced by the perjury and false statement charges against Kerner and that he should have been granted severance on that account. We have shown above (pp. 20–22, *supra*) that joinder of the perjury charge with Kerner's other offenses was proper under Rule 8(b), Fed. R. Crim. P.[10] Joinder of Kerner and Isaacs as defendants was also proper under that Rule. The indictment alleged petitioners' joint participation in an illegal conspiracy and in vio-

[9] Petitioner Kerner also contends that the co-conspirator exception to the hearsay rule offends the Sixth Amendment's Confrontation Clause where the co-conspirator declarant refuses to testify. But Kerner's premise—that hearsay is invariably inadmissible where the declarant is unavailable for confrontation—has consistently been rejected by this Court. See *Pointer* v. *Texas*, 380 U.S. 400, 406–407. And in *Dutton* v. *Evans*, 400 U.S. 74, the Court upheld a broader Georgia co-conspirator exception under circumstances in which it was reasonably clear that the co-conspirator declarant would have asserted his Fifth Amendment privilege had he been called to testify. See also *United States* v. *Addonizio*, 451 F. 2d 49, 71 (C.A. 3), certiorari denied, 405 U.S. 936.

[10] Joinder of the false statement charges was also proper for the same reasons. Petitioner Kerner does not here object to the joinder of the latter charges.

lations of the Travel Act and the mail fraud statute; these allegations amply satisfied Rule 8(b)'s requirement that co-defendants be "alleged to have participated * * * in the same series of acts or transactions constituting an offense or offenses."

Petitioner Isaacs nevertheless argues that he was entitled to a severance because Kerner, who testified for the defense at trial, was implicitly impeached by the jury's awareness of the perjury charge. This argument is substantially identical to petitioner Kerner's argument for a separate trial of the perjury charge (see pp. 20–22, *supra*), and it fails for similar reasons. Petitioner Isaacs' claim of prejudice from the joinder is vague and insubstantial; it does not amount to a showing of an abuse of discretion by the trial judge, especially in view of the lengthy and extensive duplication of witnesses and evidence that separate trials would have required.

6. Petitioner Kerner contends (Kerner Pet. 23–24) that the false statements that he made to Internal Revenue Service agents during the course of their investigation of his federal income tax returns did not violate 18 U.S.C. 1001, because those statements were unsworn oral responses to questions asked by government "investigators." It is true that some courts have held that false statements made to Federal Bureau of Investigation agents are not within the purview of that statutory offense, on the ground that since that agency has no power to regulate, compel action, or dispose of claims, it has no "jurisdiction" within the meaning of the statute. See, *e.g.*, *United States* v. *Lambert*, 470 F. 2d 354 (C.A. 5), petition for rehear-

ing *en banc* granted April 17, 1973; *Friedman* v. *United States*, 374 F. 2d 363, 368–369 (C.A. 8).[11] But it has long been understood that the Internal Revenue Service has the necessary "jurisdiction" under the statute and that false statements given to internal revenue agents pertaining to matters within that jurisdiction—such as an investigation into the correctness of federal income tax returns—are proscribed by 18 U.S.C. 1001. *United States* v. *McCue*, 301 F. 2d 452, 455 (C.A. 2) certiorari denied, 370 U.S. 939; *Knowles* v. *United States*, 224 F. 2d 168, 172 (C.A. 10); *Cohen* v. *United States*, 201 F. 2d 386, 392 (C.A. 9), certiorari denied, 345 U.S. 951.[12]

The fact that petitioner's false statements were oral and unsworn does not affect his liability under the statute. *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46; *Neely* v. *United States*, 300 F. 2d 67, 69–71 (C.A. 9), certiorari denied, 369 U.S. 864. See also *United States* v. *Bramblett*, 348 U.S. 503, 508.

7. Petitioner Kerner claims (Kerner Pet. 25–27) that the specially appointed panel below exceeded its power in failing to follow the decision of a regular Seventh Circuit panel in *United States* v. *Pacente*,

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[11] The question of the validity of such decisions with respect to the FBI was left open by this Court in *Bryson* v. *United States*, 396 U.S. 64, 71, n. 10.

[12] *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5), and *United States* v. *Philippe*, 173 F. Supp. 582 (S.D. N.Y.), on which petitioner relies, involved the different question whether an "exculpatory no" is a "statement" within the meaning of the statute. That issue is not raised by petitioner's affirmative false statements in explanation of an item on his income tax return.

supra. This contention is erroneous for several independent reasons.

First, there is no basis for petitioner's allegation that the panel below refused to follow *Pacente*. The panel expressly distinguished *Pacente* on its facts by pointing out (Pet. App. 51a–52a) the voluntary nature of Kerner's, but not Pacente's, appearance before the grand jury and the fact that perjury was merely one of nineteen charges here, whereas in *Pacente* the indictment contained only two counts. Moreover, the perjury count here was merely one of several counts alleging deceitful conduct, whereas it was the only such count in *Pacente*.

Second, even assuming the decision below conflicts with *Pacente*, one panel of a court of appeals has no obligation to follow the decision of another panel within the same circuit. See *United States* v. *Mount*, 438 F. 2d 1072, 1073–1074 (C.A. 9). And while a rehearing *en banc* is an appropriate means for resolution of an intra-circuit conflict, a litigant is not entitled to such a rehearing as a matter of right. *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247. Thus the special circumstances of this case, which preclude *en banc* consideration, do not warrant resolution by this Court of a purely intra-circuit conflict, especially since any such conflict apparently will be resolved by the Seventh Circuit in its *en banc* consideration of *Pacente*. See *Wisniewski* v. *United States*, 353 U.S. 901.

Third, it would have been inappropriate for the panel below to have applied the usual doctrine of *stare decisis* to any Seventh Circuit decision, such as *Pa-*

cente, decided after its appointment. The active judges of the Seventh Circuit presumably recused themselves here with the intention of avoiding even the appearance of sitting in judgment over one of their colleagues or of influencing the decision in his case in any way. They therefore could not have intended their decisions in other cases, rendered while petitioner Kerner's appeal was pending, to have bound the special panel that was hearing that appeal. For that reason, the panel was clearly correct in refusing to defer its decision until after *Pacente* was decided *en banc*.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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MAY 1974.

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[13]Petitioner Kerner also contends that the panel below refused to follow *United States* v. *Fellabaum*, 408 F. 2d 220 (C.A. 7), and *United States* v. *Ruthstein*, 414 F. 2d 1079 (C.A. 7), which he characterizes as holding that intent to commit acts supplying the jurisdictional element must be proven to establish a conspiracy to violate the Travel Act. In so contending, petitioner simply misstates the law of the circuit. The Seventh Circuit "has consistently affirmed conspiracy convictions where knowledge of the interstate element was not part of the trial court's conspiracy instructions." *United States* v. *Polesti*, 489 F. 2d 822, 824 (C.A. 7), petition for a writ of certiorari pending, No. 73-5489.

U.S. GOVERNMENT PRINTING OFFICE: 1974

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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1650

OTTO KERNER, JR.

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITIONER'S REPLY BRIEF

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Respondent

PETITIONER'S REPLY BRIEF

Petitioner Otto Kerner, Jr. respectfully submits this reply to the government's brief in opposition to his petition for a writ of *certiorari*.

Preliminary Statement

The government does not address the merits of the conspiracy and mail fraud issues, but instead refers to the factual record to assert purported reasons why these important issues should not be considered in this case. But in doing so the government relies on misstatements of the record facts.[1]

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[1] Although only a handful of the misstated "facts" asserted by the government are material to consideration of the questions presented, the government's factual statement as a whole is so replete with inaccuracies as to preclude the Court from relying upon it as a fair statement of the case. A few examples of such misstatements are the following:

A. "... *Kerner, in his capacity as Governor, was awarding harness racing dates* ..." (G. Br. p. 5). An independent agency was charged by law

The government does not even contend that intent to engage in interstate activity is not a required element of a conspiracy to violate the Travel Act. That contention would be indefensible

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with awarding dates. The dates in question were awarded four months earlier by the Racing Board and not by the Governor. The Governor never awarded racing dates (Tr. pp. 3254-55, 5236-40, Ex. 216).

B. "*At Isaacs' invitation, Miller submitted the names of persons whom Mrs. Everett had recommended for appointment to the Racing Board, and petitioner Kerner followed those recommendations . . .*" (G. Br. p. 4). Isaacs did not solicit Mrs. Everett's recommendations through Miller (Tr. p. 2899). Kerner did not follow all of Miller's recommendations (Tr. pp. 3080-85).

C. "*In 1961, Miller sought legislation that would permit Mrs. Everett . . . to add a harness racing corporation to her business enterprise*" (G. Br. p. 4). This statement is false. The legislation did not relate at all to Mrs. Everett obtaining a harness racing corporation (Tr. pp. 2938-9).

D. "*Those* [1962] *prices were considerably below actual market value*" (G. Br.,p. 5). The government's valuation evidence pertains solely to the year 1966. The government introduced no valuation evidence for 1962. The initial price of the stock was $1,000, at which it was offered to Kerner. It was never shown that Kerner knew of a different valuation.

E. "*Kerner, however, refused to meet with Bradley to discuss the* [Maywood] *matter and instead requested Bradley's resignation*" (G. Br. p. 6). This is false. The government's evidence never showed any refusal of Kerner to meet with Bradley about the Maywood matter. Moreover, Bradley's resignation came seven months after the Maywood matter. The government deceptively makes it appear as if Kerner fired Bradley at the time of the Maywood incident (Tr. pp. 5200-01).

F. "*Mrs. Everett's accountants had prepared documents to show the detrimental effect of the legislation on certain harness racing enterprises. Kerner agreed to consider the matter . . .*" (G. Br. p. 6). The fact is that Miller showed Kerner documents demonstrating that the State would lose revenue as a result of the legislation (Tr. pp. 3066-67, 3069). Neither harness racing in particular, nor any group of enterprises, was peculiarly affected. The legislative issue involved is that which still persists where parimutuel betting is allowed–how much should the state take from the betting pool without losing bettors and revenue. The bill which Kerner supported was exactly the national average–15%.

G. The government in page 7 of its brief makes the misleading statement that Kerner abolished the Harness Racing Commission, suggesting that Kerner did away with regulation of the industry. Kerner merely approved a law which merged the Racing Board and the Harness Commission into one expanded agency (Tr. pp. 3079-80).

because in the absence of both interstate activity and an intent to use interstate activity, there is no federal jurisdiction. This is the first federal Travel Act conspiracy case in history to be upheld by a Court of Appeals without any federal jurisdictional element in the form of either interstate travel or intent to employ interstate activity. So the government argues only that the Court need not consider the issue, contending that conviction of the other prong of the alleged conspiracy, mail fraud, was proper *because there was a proper instruction on the requisite intent to use the mails*! The government asserts that a jury instruction was given by the trial court that intent to use the mails was a necessary finding to support conviction of conspiracy to commit mail fraud (G. Br. p. 19, n. 7). *This is an egregious misstatement; the trial court gave no such instruction.* The government's incorrect record reference is to the court's instruction on *substantive* mail fraud (Tr. 7457-7461). In instructing the jury on the substantive mail fraud counts, the trial court stated that "*it is not necessary that the use of the mails be contemplated . . .*" (Tr. p. 7458). The court specifically refused Kerner's requested instruction that intent to use the mails was a necessary element of the conspiracy. So, the government avoids the merits by relying upon a false record reference.

Again, the government does not argue that "faithful and loyal services" alone can be the object of a mail fraud scheme. Instead, the government now claims that the scheme resulted in

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H. "*Additional state revenues . . . would have been received if legislation favoring track operators had not been enacted*" (G. Br. p. 16). The fact is that Kerner sponsored and obtained a tax increase on all racing tracks which because of its progressive nature adversely affected Mrs. Everett more severely than others. The tax increase passed unanimously in both houses of the Illinois Legislature (Tr. pp. 7099-7115, Exs. 2-23, 2-24).

I. "*Innocent racing associations in the State were deprived of the additional profits that might have accrued from an impartial assignment of racing dates*" (G. Br. pp. 16-17). Not a single thoroughbred racing date was changed during Kerner's eight years as Governor (Exs. 583-88), but remained the same as they had in previous years. Not a single company was deprived of any harness dates requested by it except for the detrimental shift from fall to spring dates of one of Mrs. Everett's tenant racing associations.

a loss of money or property. But in doing so, the government makes a hypothetical factual assertion never before advanced in this case. It is asserted that innocent racing companies were deprived of the additional profits "*that might have accrued*" to them and that the State might have received more racing revenue. Such fanciful hypothesizing should have no place in a brief of the Solicitor General. It is difficult for counsel to combat such factual misstatements where the Court does not have the record before it. In this situation, to take the noted example, we can but represent to the Court that *there is not one iota of record support for the proposition that any company lost a single racing date or a dime in profits, or that the state lost any revenue.* Nor was there any alleged scheme to reach that result. Revenue to the State of Illinois from taxes on racing increased from $18.0 million in 1961 to $40 million in 1968 (Tr. pp. 1964-2003) and all racing associations shared in the growth of the sport during those years (Exs. 481-489). See footnote 1, H and I.

The government, of course, seeks to create an aura of factual complexity to shroud the merits of the issues presented. The issues themselves, however, are clearly and simply defined in our petition and do not depend upon a massive study of the record.

ARGUMENT

1. In a related context, the Solicitor General has characterized the issue of the indictability of a person subject to impeachment as "a grave and unresolved constitutional issue . . . of utmost importance."[2]

The parties' differing interpretations of Art. I, §3, Cl. 7 of the Constitution demonstrate that a substantial and unresolved issue confronts the Court. Whether that clause was written by the Framers merely to prevent a plea of double jeopardy by an official removed by Congress, or whether the Framers intended that clause to have greater significance by setting out a sequence of sanctions, is a question never resolved by this Court. It is clearly important for the Court to determine the amenability to criminal prosecution of a federal judge subject to the impeachment power.

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[2] Memorandum of the United States, In re Application of Spiro T. Agnew, Civ. 73-965 (D. Md., 1973).

Likewise, the parties have each set forth conflicting judicial and scholarly conclusions on the issue. The lower courts and constitutional scholars will continue their empty debates unless this Court decides the question.[3]

The power of a court to try a federal judge is clearly a substantial constitutional question going to the jurisdiction of the judiciary *vis-a-vis* the jurisdiction of the Congress. As such, it is a question of subject matter jurisdiction which can be raised at any time. A constitutional issue of such novelty in the end can only be resolved by appellate decision.

2. The government asserts that the Congress *may* forbid any mailing in furtherance of a scheme that is contrary to public policy, *e.g.*, a scheme to deprive citizens of a state of the honest services of a governor (G. Br. p. 15). The permissible scope of what Congress may or may not enact begs the question. The question is whether Congress has in fact intended by the mail fraud statute to cover such conduct. The government asserts that any mailing in furtherance of a state bribery scheme falls within the mail fraud statute (G. Br. p. 15). But it is precisely this use of a federal criminal statute to cover any local bribery scheme which forms the heart of the significant issue of federalism raised in this case. Section 1341 is not aimed at local bribe schemes; it is directed at mailings which further a fraud scheme and such a scheme requires an object of the fraud. A charge that a state and its citizens are the objects of a scheme to deprive them of honest and loyal services is simply not covered by the mail fraud statute.

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[3] The government's historical references are feeble props. The 1796 Attorney General's opinion pertained to an Article I territorial judge and not to a judge protected by Article III. We question the reference to two prior criminal trials of sitting federal judges as precedents. Judge Warren Davis of the Third Circuit was indicted and tried twice, each trial resulting in a hung jury. The instant issue was thus never presented for appellate review because the indictment was dismissed. District Judge Albert Johnson of Pennsylvania resigned before he was indicted and tried. We are not aware of any other pertinent precedent.

Recognizing these deficiencies, the government concocts for the first time a theory never presented at trial, that the state would have made more money in taxes and racing companies would have made bigger profits but for Kerner's alleged acceptance of a bribe. As demonstrated above, these fanciful arguments have no support and could not have been the predicate of the jury's verdict.

The government concedes that the mailings came after the alleged bribe scheme, but argues that they furthered the concealment phase of the scheme (G. Br. p. 17). *United States v. Maze*, 42 U.S. L. Week 4113 (1974), squarely held that the mailings must be necessary to effectuate the scheme rather than merely to promote a subsequent concealment.

In support of its argument, the government makes two false factual assertions at page 9 of its brief. Count VIII simply did not involve the mailing of Knight's check to Kerner as the government states. Count VIII was based on the regular mailing by Kerner's bank, in which Kerner had deposited the check personally, of all daily check deposits to a Chicago national bank for clearing. Count IX did not involve the mailing by Schaller of his check to Kerner. Count IX consisted of Kerner's mailing of a dividend check representing his portion of a dividend paid to all shareholders to his bank for deposit. It is inconceivable that the Solicitor General's office could have any real grasp or comprehension of the factual record and have made such flat misstatements.

3. The conspiracy issue is sharply framed: does a Travel Act conspiracy require proof of an agreement to use interstate activity, as the line of Second Circuit cases holds, or is interstate activity merely "jurisdictional", as the Ninth Circuit holds? This case is the ideal vehicle for resolving the conflict, because the conspiracy stands alone without proof of any interstate activity.

The government does not even attempt to argue that a conspiracy to violate the Travel Act may stand in the absence of any interstate activity or any intent to engage in interstate activity. Implicitly, the government concedes that the Court of Appeals was wrong in failing to recognize the intent element. Thus, the government concedes that Kerner stands convicted by a federal court of conspiracy to violate state law. The sole argument is one in avoidance of the merits. Since, says the

government, Kerner was properly convicted of conspiracy to commit mail fraud, the Court need not consider whether the other aspect of the conspiracy conviction was valid.

But the government assumes the validity of the conspiracy conviction on the mail fraud facet. The jury was never told, as requested, that they must find intent to use the mails in order to convict on conspiracy. This alone would mandate reversal, because intent to use the mails is concededly an essential element of the crime. *Pereira v. United States*, 347 U.S. 1 (1954).

This is not a case where the jury was entitled to find a conspiracy to achieve one object even though they could not properly convict as to another object.[4] This is a case where one phase of the conspiracy was insupportable by reason of the absence of intent to engage in interstate activity and the other phase of the conspiracy was submitted under an improper charge.

It is worth reemphasizing the fact that there has never been a single reported federal decision upholding a conspiracy conviction with no federal jurisdictional element present. Even in the few cases which do not recognize interstate intent as an element of the conspiracy, there has been jurisdictional proof present in that the defendants actually engaged in interstate activity.[5] Indeed, no court has ever even had occasion to consider the intent requirement in a context of a total absence of interstate activity. Even the *Roselli* decision, the leading case rejecting the requirement for proof of interstate intent, noted

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[4] But it is well settled that a count which goes to a jury on two theories, one of which is invalid, cannot stand because the jury may well have convicted on the invalid theory. *Mills v. United States*, 164 U.S. 644 (1897); *Nicola v. United States*, 72 F.2d 780, 787 (3d Cir. 1934); *United States v. Jacobs*, 475 F.2d 270 (2d Cir. 1973); *see also, Milanovich v. United States*, 365 U.S. 551 (1971). Even if the mail fraud conspiracy case was properly submitted to the jury, it is possible that the jury found Kerner guilty of a conspiracy to violate the Travel Act but not of a conspiracy to commit mail fraud. Moreover, if the "faithful services" concept of mail fraud is wrong, there is no mail fraud conspiracy.

[5] *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970) *cert. denied*, 401 U.S. 924 (1971); *United States v. Polesti*, 489 F.2d 822 (1973).

the incredibility of a conspiracy charge without a federal jurisdictional base, for in *Roselli* there was abundant evidence of interstate travel:

> "It may be argued that because a conspiracy to commit a substantive offense may exist without actual commission of the substantive offense, conspiracies to commit state crimes might be charged under the federal conspiracy laws if there were no need to prove agreement about the aspects of the crime that confer federal jurisdiction. The simple answer is that absent the presence of the jurisdictional element, no charge can be made. The point is not that the jurisdictional element need not exist, but merely that there need be no proof that the defendants were aware of its existence." 432 F.2d at 892.

The government's silence on the merits of this issue is significant. It is obvious that the government finds indefensible the proposition that a conspiracy to violate the Travel Act can stand without proof of interstate activity or intent to engage in interstate activity. It is for this reason that the government struggles so laboriously to avoid reaching the merits by relying upon the mail fraud conspiracy conviction.

4. The government concedes that the Seventh Circuit's forthcoming *in banc* decision in *Pacente* will resolve the conflict between the specially appointed panel in this case and the panel in *Pacente* (G. Br. p. 26). Obviously, the government's brief cannot be read to hold that Kerner is not entitled to receive, as every other citizen tried in the Seventh Circuit, the benefits of the *Pacente* rule. Since the law of the Seventh Circuit will soon be announced, it is appropriate that this Court defer consideration and action on this petition until *Pacente* is decided. If the *Pacente* panel's opinion is affirmed by the Seventh Circuit, this case should be in a posture to be reversed if Kerner is to have his case decided under the rule of law and not by a special Court of Appeals which feels free to adopt whatever prescription of law it will.[6] Accordingly, if the

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[6] In his petition for rehearing by the special panel, Kerner suggested that the petition be held until the *in banc Pacente* decision is available. If

Seventh Circuit holds in *Pacente* that perjury counts may not be joined with other counts, *certiorari* would certainly be granted in that case and this one so that a principal of law is not fashioned to convict one man.

The government contends that the evidence of perjury would be admissible against Kerner in a separate trial of the other counts and that therefore severance would be fruitless. Such evidence may or may not be admissible in a separate trial, depending upon the rules of evidence.[7] Whether or not admissible, the evidence of Kerner's statements in a separate trial would not go to the jury in the form of a finding by the grand jury that Kerner lied. Rather, the statements would go to the jury as any other testimony to be believed or not, as the jury decides. The prejudice of joinder is not merely that a defendant's false statements are introduced. The prejudice inheres in the fact that a grand jury finding that the defendant lied shifts the burden of proof to the defendant.

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that had been done, this Court would not be presented with this application in advance of that decision. Judge Lumbard's opinion for the majority (66a) rejected that reasonable request upon the remarkable ground that the special panel would not be bound by an *in banc Pacente* decision–which favored Kerner! Judge Johnsen's strong dissent shows how such a result puts the judiciary into an unfavorable light (70a-72a).

[7]One of which would exclude co-conspirator declarations as evidence of perjury where perjury is used to prove the conspiracy.

CONCLUSION

Federal jurisdiction has been stretched to the breaking point in this case to support Kerner's conviction.

For all of the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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June 10, 1974

FILED
JUL 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

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PETITION FOR REHEARING

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UNITED STATES OF AMERICA

PETITION FOR REHEARING

Otto Kerner, Jr., pursuant to Rule 58(2) of the Rules of this Court, petitions the Court for rehearing of its order of June 17, 1974, denying his petition for a writ of certiorari.

Petitioner submits that there has occurred, in the words of Rule 58, an "intervening circumstance . . . of substantial . . . effect" since the denial of certiorari: namely, that the United States, in an abrupt reversal of position, claimed for the first time in its reply brief in *United States* v. *Nixon,* Nos. 73-1766, 73-1834, that

there is no constitutional distinction between the amenability of a President and of an Article III judge to criminal indictment and prosecution. Neither petitioner, nor, we respectfully submit, the Court, could have foreseen at the time certiorari was under consideration in this case the centrality of this issue in *United States* v. *Nixon.*

I. THE LAW OF REHEARING

The Court has granted rehearing on a denial of certiorari in cases strikingly like this one. For example, in *Pickett* v. *Union Terminal Co.,* 313 U.S. 591 (1941) (certiorari denied), 314 U.S. 704 (1941) (rehearing granted and certiorari granted), 315 U.S. 386 (decision on the merits *sub nom. Williams* v. *Jacksonville Terminal Co.*) (1942), the rehearing was granted apparently because the decisive issue in *Pickett* assumed enhanced importance when it was found to have been the subject of dispute in another proceeding.

In *Forgett* v. *United States,* 383 U.S. 926 (1966), 390 U.S. 203 (1968), certiorari was first denied and then granted and the conviction vacated. In the interim, the Court had decided to grant certiorari and reverse in *Haynes* v. *United States,* 390 U.S. 85 (1968), deciding a constitutional issue found also to be dispositive in *Forgett.*

Alderman v. *United States,* 394 U.S. 165 (1969), was the product of a rehearing after denial of certiorari, followed by a per curiam order (390 U.S. 136 (1968)), followed by plenary argument. See also, *Reid* v. *Covert,* 351 U.S. 487 (1956), 352 U.S. 901 (1956), 354 U.S. 1 (1956).

There is, in sum, wisdom in Justice Frankfurter's observation:

> The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process.

City of Detroit v. *Murray Corp.*, 357 U.S. 913, 915 (1958) (dissenting opinion).

II. THE INDICTABILITY OF A FEDERAL OFFICER AND THE UNITED STATES' REVERSAL OF POSITION

One of the issues raised by petitioner Kerner and decided adversely to him by the Court of Appeals (493 F.2d at 1144) is that Article I, Section 3, Clause 7 of the Constitution, together with the lifetime tenure provision of Article III, proscribes criminal indictment and prosecution of a federal judge prior to his removal by the Congress. In its brief in the Court of Appeals in this case, the United States took the position that the Founders "intended to exempt the President from indictment prior to impeachment." The United States sharply distinguished the case of a federal judge, arguing that "the reason advanced for the immunity of the Chief Executive does not even exist insofar as federal judges are concerned."[1]

Now, in *Nixon*, the United States takes squarely the position that there is no constitutional distinction at all between the President and a judge in respect of their indictability. Relying heavily upon the opinion of the Court of Appeals in this case (*United States* v.

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[1] Government's Brief in the Court of Appeals, p. 55. The government also distinguished the situation of a vice-president in its Brief in the Maryland District Court in the *Agnew* case (Civil Action No. 73-965 (D. Md. 1973)).

Isaacs, 493 F.2d 1124 (7th Cir. 1974)), the United States takes the position that "the clause in question applies to all civil officers who are subject to impeachment, and not solely to the President." (G. Reply Br. p. 26) The United States argues that *Isaacs* is controlling because the Court of Appeals' opinion rejecting Kerner's claim of immunity "made no effort to distinguish the President from the sweep and force of this statement." (G. Reply Br. p. 27) Clearly, Article I, Section 3, Clause 7 makes no such distinction. Having stated that the clause covers both the President and a federal judge, the government proceeds to acknowledge that the issue is not free from doubt and that the President's argument for immunity has substantial support (G. Reply Br. p. 24). In short, there is a tacit concession that this issue of burning public concern and of highest importance in the law of separation of powers, merits a decision by the one body—this Court—constitutionally empowered to decide it.

The government does observe in *Nixon* that this Court need not reach the issue of the President's indictability. However, the President's immunity has been forcefully argued as the principal reason why the President may not be named as an unindicted co-conspirator. This Court, therefore, may or may not reach the issue of immunity and construe the meaning of Article I, Section 3, Clause 7. However, if this Court reaches that issue and if this Court agrees with the well-founded assertion of the United States that there is no difference between the President and a judge, then such a decision will have a direct and dispositive impact upon Kerner's case.

At the time that Kerner filed his petition for certiorari, the position of the United States was that a

federal judge is amenable to criminal prosecution but that the President is not. Only recently, in its reply brief in the *Nixon* case, has the government changed its position.

Respectfully submitted,

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Pursuant to Rule 58(2) of the Rules of this Court, I hereby certify that this petition for rehearing is presented to the Court in good faith and not for delay. No stay of execution of sentence will be sought. I also certify that this petition is restricted to the ground of an intervening circumstance occurring subsequent to the Court's order denying petitioner's petition for a writ of *certiorari*.